CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 399

SOUTHERN RAILWAY COMPANY, PETITIONER,

vs.

MRS. OLIVIA COX LUNSFORD, AS ADMINISTRATRIX OF THE ESTATE OF J. M. COX, DECEASED

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

PETITION FOR CERTIORARI FILED AUGUST 27, 1935.

CERTIORARI GRANTED OCTOBER 14, 1935.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No.

SOUTHERN RAILWAY COMPANY, PETITIONER,

vs.

MRS. OLIVIA COX LUNSFORD, ADMINISTRATRIX OF THE ESTATE OF JAMES MONROE COX.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA.

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SUPREME COURT OF GEORGIA

ORDER TRANSFERRING CASE—May 19, 1934

Atlanta, May 19, 1934.

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

SOUTHERN RAILWAY CO.

v.

O. C. LUNSFORD, ADMX.

It is ordered that this case be hereby transferred to the Court of Appeals. Bill of costs, $10.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 2] IN SUPERIOR COURT OF HARALSON COUNTY

July Term, 1933

No. 2229

MRS. OLIVIA COX LUNSFORD, Administratrix of Estate of James Monroe Cox,

vs.

SOUTHERN RAILWAY COMPANY

BILL OF EXCEPTIONS AND ORDER—Filed May 1, 1933

STATE OF GEORGIA,
Haralson County:

Be it remembered, that on the 12th day of April, 1935, Mrs. Olivia Cox Lunsford, Administratrix of the Estate of James Monroe Cox, filed her suit against the Southern Railway Company in the Superior Court of Haralson County, Georgia, said suit being Numbered 2229 and made returnable to the July Term, 1933, of said Court; said suit being a

suit brought in two counts for the sum of Fifty Thousand Dollars ($50,000.00) on account of the death of James Monroe Cox, alleged to have been caused by the negligence of the defendant; that thereafter, within the time provided by law, and on August 16th, 1933, the defendant filed its answer and demurrer to the petition filed in said case; as shown by the record in said case; that thereafter, on November 18th, 1933, plaintiff amended said petition, which amendment was allowed on November 18th, 1933, and thereafter said petition as amended and the demurrer thereto came on to be heard before the Superior Court of said County, the Honorable J. R. Hutcheson, Judge of said Court, then and there presiding, and, after argument of counsel, the Court passed its order overruling said demurrer, and that thereafter, and within the time allowed by law and the rules of Court, defendant, Southern Railway Company, tendered its bill of exceptions pendente lite, excepting to and assigning error upon each and all of said rulings of the Court, which said bill of exceptions pendente lite, after being duly certified and approved by the trial Judge, was filed as a part of the record in said case on the [fol. 3] 14th day of December, 1933; and the defendant, Southern Railway Company, (Plaintiff in Error in this bill of exceptions), assigns error upon its said bill of exceptions pendente lite and says that the Court erred in each and all of the rulings complained of therein for the various reasons assigned with reference thereto respectively.

Be it further remembered, that thereafter, on December 14th, 1933, plaintiff amended her petition by an amendment allowed, subject to demurrer, on said 14th day of December, 1933, and filed on January 15th, 1934; to said amendment so filed the defendant, Southern Railway Company, filed its demurrer on January 15th, 1934, which demurrer to the amendment came on to be heard before the Superior Court of Haralson County, Georgia, the Honorable J. R. Hutcheson, Judge of said Court, then and there presiding, and, after argument of counsel, the Court passed its order overruling said demurrer, and that thereafter, and within the time allowed by law and the rules of Court, defendant, Southern Railway Company, tendered its bill of exceptions pendente lite, excepting to and assigning error upon each and all of said rulings of the Court, which said bill of exceptions pendente lite, after being duly certified and approved

by the trial Judge, was filed as a part of the record in said case on the 22nd day of January, 1934; and the defendant, Southern Railway Company, (Plaintiff in Error in this bill of exceptions), assigns error upon its said bill of exceptions pendente lite and says that the court erred in each and all of the rulings complained of therein for the various reasons assigned with reference thereto respectively.

Be it further remembered, that thereafter said case came on to be tried in the Superior Court of Haralson County, Georgia, at the regular January Term, 1934, of said Court, the Honorable J. R. Hutcheson, Judge of said Court, then and there presiding, and on January 16th, 1934, a jury was [fol. 4] stricken and evidence introduced in behalf of the plaintiff and the defendant, and, after argument of counsel and charge of the Court, the jury retired and returned a verdict in favor of the plaintiff in the sum of five Thousand Dollars ($5,000.00), and judgment was duly entered thereon; that thereafter, within the time provided by law, and within thirty days from the date of said verdict and judgment, and on the 22nd day of January, 1934, the defendant filed its motion for new trial in said case, and rule nisi was duly issued thereon; that thereafter, in accordance with the orders of court in said rule nisi, and on the 5th day of April, 1934, movant had approved and filed a brief of the evidence delivered on the trial of said case, and on said date of April 5th, 1934, filed a copy of the charge of the court delivered on the trial of said case, which charge of the court was approved on April 5th, 1934, and on said date of April 5th, 1934, had approved and allowed an amendment to said motion for new trial, which was filed on April 5th, 1934, all as appears of record in said case.

Be it further remembered, that thereafter said motion for new trial as amended came on to be heard in the Superior Court of Haralson County, Georgia, the Honorable J. R. Hutcheson, Judge of said Court, then and there presiding, and, after argument of counsel, the Court passed its order overruling said motion for new trial as amended, which order of court overruling said motion for new trial as amended was entered on the 5th day of April, 1934.

To this order of court overruling said motion for new trial as amended, the defendant, Southern Railway Company, movant in said motion, then and there excepted and now excepts, and assigns the same as error, and says that

the Court erred in overruling said motion for new trial as amended on each and all of the grounds therein stated.

The plaintiff in error in this bill of exceptions, Southern [fol. 5] Railway Company, tenders this its bill of exceptions, in which it names itself as Plaintiff in Error, and names Mrs. Olivia Cox Lunsford, Administratrix of the Estate of James Monroe Cox, as Defendant in Error.

* * * * * * *

Plaintiff in Error in this bill of exceptions specifies as material to a clear understanding of the errors complained of the following portions of the record in said case, to-wit:

1st. The original petition in said case, filed on the 12th day of April, 1933.

2nd. The original answer of the defendant in said case, filed on August 16th, 1933.

3rd. The defendant's demurrer to the plaintiff's petition, filed on August 16th, 1933.

4th. The first amendment to plaintiff's petition, filed on November 18th, 1933.

5th. The order on defendant's demurrer, entered on the 18th day of November, 1933.

6th. The bill of exceptions pendente lite, filed by the defendant on the 14th day of December, 1933.

7th. The second amendment to plaintiff's petition, allowed on December 14th, 1933, and filed on January 15th, 1934.

8th. Defendant's demurrer to plaintiff's second amendment to her petition, allowed on December 14th, 1933, and filed on January 15th, 1934, which said demurrer was filed on January 15th, 1934.

9th. The order on defendant's demurrer to plaintiff's second amendment to her petition, entered on the 15th day of January, 1934.

10th. The bill of exceptions pendente lite, filed by the defendant on the 22nd day of January, 1934.

11th. The verdict of the jury rendered in said case on the 16th day of January, 1934.

[fol. 6] 12th. The judgment of the Court on said verdict, dated the 16th day of January, 1934.

13th. The motion for new trial filed by defendant on the 22nd day of January, 1934, with rule nisi and acknowledgment of service thereon.

14th. The brief of the evidence with the order and entries thereon, filed on the 5th day of April, 1934.

15th. The amended motion for new trial in said case, with the approval of the Judge thereon, filed in said case on the 5th day of April, 1934.

16th. The order of Court overruling said motion for new trial as amended, entered on the 5th day of April, 1934.

17th. The charge of the Court with the approval of the Judge thereon, dated the 5th day of April, 1934, and filed on the 5th day of April, 1934.

18th. The entries of filing of each and all of the parts of the record above specified to be entered and transmitted in the proper order.

And now, within the time provided by law, and within thirty days of the entry of the judgment overruling said motion for new trial as amended, comes the defendant, Southern Railway Company, and tenders this its bill of exceptions and prays that the same may be certified as provided by law, in order that the errors complained of may be considered and corrected by the Supreme Court of the State of Georgia.

This the 25th day of April, 1934.

Griffith & Matthews, Maddox, Matthews & Owens, P. O. Addresses: Buchanan, Georgia, Rome, Georgia, Attorneys for Southern Railway Company, Plaintiff in Error in this Bill of Exceptions.

[fol. 7] I do certify that the foregoing bill of exceptions is true, and specifies all of the record material to a clear understanding of the errors complained of; and the Clerk of the Superior Court of Haralson County, Georgia, is hereby ordered to make out a complete copy of such parts of the record in said case as are in this bill of exceptions specified, and certify the same as such, and cause the same to be transmitted to the present term of the Supreme Court of the State of Georgia, that the errors alleged to have been committed may be considered and corrected.

This the 25th day of April, 1934.

J. R. Hutcheson, Judge of the Superior Court of Haralson County, Georgia.

Due and legal service of the within bill of exceptions ac-

knowledged, copy and all other and further notice or service hereby waived.

This the 25 day of April, 1934.

Arnold, Gambrell & Arnold, —— ——, P. O. Addresses: Buchanan, Georgia, Atlanta, Georgia, Attorneys for Mrs. Oliver Cox Lunsford, Administratrix of Estate of James Monroe Cox, Defendant in Error in this Bill of Exceptions.

[fol. 8] Clerk's certificate to foregoing paper omitted in printing.

[File endorsements omitted.]

[fol. 9] In Superior Court of Haralson County

Petition—Filed April 12, 1933

First Count

Georgia,
Haralson County:

To the Superior Court of said County:

The petition of Mrs. Olivia Cox Lunsford, who brings this action as administratrix of the estate of James Monroe Cox, shows to the court the following case:

1. Plaintiff is administratrix of the estate of James Monroe Cox, deceased, who will be hereinafter called the decedent.

2. The defendant in this action is Southern Railway Company, which is a railway corporation running a line of track and having an office and agent upon whom service of process can be made in said County, and the cause of action originated in the said County of Haralson.

3. The said defendant has endamaged plaintiff as administratrix of the estate of James Monroe Cox as aforesaid in the sum of Fifty Thousand Dollars ($50,000.00) on account of the case which will be hereinafter stated, and judgment is prayed against said defendant for said sum.

4. On the 14th day of February, 1933, the decedent, James Monroe Cox, was an engineer in the employment of the defendant and on that day he was engaged in interstate commerce and the defendant was engaged in interstate commerce, in that the decedent, as engineer, was driving a passenger train of the defendant from Birmingham, in the State of Alabama, to Atlanta, in the State of Georgia, the said train being known as eastbound passenger train number 40 of the defendant.

5. At about 10:30 o'clock A. M., which the decedent was so driving the engine of said passenger train in interstate commerce, and at a point approximately one and thirty-five one hundredths (1.35) mile west of the defendant's railway station at Bremen, Georgia, and while rounding a sharp curve on defendant's track, wheels of the front trucks [fol. 10] under the engine left the rails, but the engine, including all the drivers and other wheels thereof, remained on the track, and the engine continued to function apparently normally to the engineer and fireman, the said front trucks being entirely out of view to them and there being nothing to put them on notice that they had left the rails, and the construction of said engine being such, by means of chains, which suspended said trucks from the body of the engine, and other appliances, that the said front trucks could be off the rails and the engine still continue to function normally and there being nothing to put the engineer and fireman on notice that they were off the rails.

6. After wheels of said trucks under the front end of the engine left the rails the engine continued to run apparently normally, pulling the train as usual for a distance of seven tenths (0.7) of a mile until it reached a switch going out to the right from the main line, at which point the said trucks, with said front wheels attached thereto being off the track and dangling by means of said chains and other appliances from the front end of the engine, struck said switch, and the effect of striking said switch was to throw said trucks and wheels to one side and under the engine and obstruct their further progress along the track and to cause the engine as a whole to leave the rails and to become unbalanced and, after running about one hundred yards in this condition, to turn over, and in so turning over the steam and scalding water escaped from the same

and the decedent, James Monroe Cox, was so crushed, mangled, bruised, scalded and burned that he died as a result of said injuries within about one hour therefrom.

7. The defendant was negligent and failed to exercise ordinary care in all the particulars aforesaid and in the particulars which will now be stated, to-wit:

[fol. 11] 8. The death of said decedent, resulted because of defects and insufficiencies due to the defendant's negligence in its engines, appliances, track and road-bed.

9. The place of said initial derailment, one and thirty-five one hundredths (1.35) miles west of the station at Bremen, was around a very sharp curve, the track curving to the left in the direction in which the engine was going and the decedent being on the outside of the curve. The track did not have sufficient elevation on the right side going east to render it safe to propel an engine weighing in the neighborhood of two hundred tons, as did the engine in question, over said point. The said engine was proceeding at the regular schedule of speed of approximately thirty (30) miles per hour, and it is alleged that for an engine of that weight the elevation of the track was insufficient on said outside or right hand side of the direction in which it was going.

10. Plaintiff further alleges that at said initial point on said curve where the trucks got off the track the rails and track were not firm and secure but on the contrary the curve was very sharp and was insufficiently braced and the rails sat on iron plates on ties which were insufficiently spiked, it being alleged that on the outside of said rails said plates had openings or holes for two spikes which were necessary to give them a firm setting on the tie; whereon, at this point all of said plates had on the outside a spike in only one of said openings and failed to have a spike in the other opening, which was negligence and which made the track insecure and which allowed the said rails to yield to the pressure of a heavy train at said point, which caused a certain amount of looseness and vibration in the rail and caused the same to give at the top and to have a tendency to give and thus enable the flange of a wheel to ride over the rail at said point.

[fol. 12] 11. Plaintiff further alleges that at said initial point of derailment, one and thirty-five one hundredths

(1.35) miles from said station, the crossties were rotten and out of condition and failed to support firmly and securely the spikes driven through said plates to hold the rail in place, but on the contrary the rotten condition of said ties allowed said spikes to have play and room and the same were not tight and allowed the rail to vibrate and cause the top thereof to give and to allow the flange of a wheel to climb over the same.

12. Plaintiff further alleges that on account of the constant vibration and the rottenness of the ties at the time of said collision, the said spikes had worked up to a point above the flange of the rail and did not come in close and tight contact with the same so as to make the same secure, but on the contrary there was a space between the head of the spikes and the bottom flange of the rail which allowed play and vibration and looseness and insecurity in said rail and which had a tendency to and did cause the said front trucks to mount the outside of said rail and ride over the same.

13. It was the insufficiency of the out or bearing rail due to all of the causes aforesaid which caused said trucks to mount said outside or bearing rail and the right hand wheel went off on the outside of said bearing or outside rail and the left wheel went off on the inside.

14. The flanges of the front wheels of said engine were sharp and out of condition and the shop authorities of the defendant were negligent in allowing the same to go in service on said day.

15. Plaintiff further alleges that said engine was equipped with what is called a watchman, which was an apparatus consisting of pipes, iron or steel contrivances, and other [fol. 13] apparatus under the body of said engine extending from the back to the front end thereof, and consisting of cylinders, valves and other apparatus, including air, and which automatically, whenever said front wheels of said engine should leave the track, was designed, by means of a valve which was tripped by the derailment of said wheels, to apply the air on the brakes of the entire train, and had said appliance known as a watchman been in repair, the movement of said train at said point would have been stopped in a couple of hundred yards, which would have

been automatic and without any effort on the part of the engineer, but the defendant, on said occasion, before said engine left Birmingham, Alabama, failed to properly inspect said watchman to see that the same was in condition to work, and plaintiff alleges that the same was not in working or functioning order at the time of said derailment and the same failed to apply the brakes as was its design and purpose and as it would have done had the defendant exercised its duty of inspection under the body of said engine and had ascertained that said watchman was in repair before said trip from Birmingham to Atlanta. The same was not the duty of the decedent who had no concern or part therewith. Had the said watchman functioned, the train would have been stopped long before striking said right hand switch and turning over and the life of the decedent would have been saved.

16. Plaintiff also alleges that at a point about 25 or 35 feet west of the switch which turned to the right and at which point the engine began to turn over and finally did turn over, the cross ties were rotten and not securely ballasted and that the spikes were almost out of the plates and the rail was not secure, all of which contributed to the said final derailment after the engine had run said seven-tenths (0.7) of a mile.

[fol. 14] 17. On account of each and all of the foregoing negligent acts and omissions of the defendant and on account of each and all of the defective and insufficient conditions of the defendant's engines, appliances, machinery, track and road-bed, due to its negligence, the said derailment and turning over of said engine and consequent death of the decedent occurred.

18. Plaintiff brings this action under the Act of Congress of April 22, 1908, and all subsequent amendments thereto, regulating the liability of carriers engaged in interstate commerce to their employees, and plaintiff alleges that the said decedent was a widower, his wife having died several years before the decedent's death, and the said decedent left surviving him two children, one of whom is the plaintiff, Mrs. Olivia Cox Lunsford, and the other of whom is Hubert A. Cox, the said two children being his only surviving children. Plaintiff alleges that the decedent's life was of great value to the said children, and this action is

brought by plaintiff as administratrix for the benefit of said children. The decedent was 59 years of age and had an expectancy in life of 14.92 years. His earnings were about $325,00 per month and said earnings would have continued throughout his entire expectancy. The said decedent contributed out of his said earnings for the benefit of his two surviving children the sum of $200.00 per month, which contributions would have kept up until his death, said contributions being in money, in services, in house rent, in contributions of property, groceries, automobiles, furniture, and in payment to employees for services rendered said two children. The said decedent was healthy and able-bodied and had no one on whom, outside of his own personal expenses, to spend his money except said two children, and damages are laid at the aforesaid sum of $50,000.00.

[fol. 15] Wherefore plaintiff prays process may issue requiring the defendant to be and appear at the next term of this court to answer plaintiff's complaint.

Arnold, Arnold & Gambrell, Attorneys for Plaintiff.

And for further cause of action and by way of an additional count plaintiff says:

Second Count

GEORGIA,
Haralson County:

To the Superior Court of said County:

The petition of Mrs. Olivia Cox Lunsford, who brings this action as administratrix of the estate of James Monroe Cox, shows to the court the following case:

1. Plaintiff is administratrix of the estate of James Monroe Cox, deceased, who will be hereinafter called the decedent.

2. The defendant in this action is Southern Railway Company, which is a railway corporation running a line of track and having an office and agent upon whom service of process can be made in said county, and the cause of action originated in the said County of Haralson.

3. The said defendant has damaged plaintiff as Administratrix of the Estate of James Monroe Cox as aforesaid in

the sum of Fifty Thousand Dollars ($50,000.00) on account of the case which will be hereinafter stated, and judgment is prayed against defendant for said sum.

4. On the 14th day of February, 1933, the decedent, James Monroe Cox, was an engineer in the employment of the defendant and on that day he was engaged in interstate commerce, in that the decedent, as engineer, was driving a passenger train of the defendant from Birmingham, in the State of Alabama, to Atlanta, in the State of Georgia, the said train being known as eastbound passenger train number 40 of the defendant.

[fol. 16] 5. On said 14th day of February, 1933, while the decedent as engineer in interstate commerce was driving from Birmingham, Alabama to Atlanta, Georgia a passenger train of defendant known as number 40, and when said engine reached a point one and thirty-five one hundredths (1.35) miles west of the station at Bremen, Georgia, the train going in an easterly direction, the front trucks of said engine struck a rock or other object negligently allowed by the defendant to be on said track and adjacent to the rails thereof and especially the outside or bearing rail, and upon striking said rock the said front trucks were derailed.

6. It is alleged that the defendant was negligent in allowing said rock or other obstruction adjacent to and on said rails to be at said time and place on said track.

7. The defendant's section hands the section foreman at said point were negligent in failing to properly inspect said track at said point as the said curve was very acute and dangerous and as said rock or obstruction had remained on said track for upwards of one hour before said train passed in close proximity to said station at Bremen, Georgia.

8. It is further alleged that the curve was to the left at said place, and had been for three hundred yards, and the engineer was on the outside of the curve and had no opportunity to see the track any distance ahead of the engine; whereas, the fireman on said engine was on the inside of the curve, and said engine was provided with an automatic stoker which fired the same by machinery and required only the turning of valves, and at the time of said initial derailment of said front trucks the fireman had no other duty to

perform than to look out on his side of the engine and in the exercise of ordinary care should have looked out on his side of the engine as that was the only side from which the [fol. 17] track could be seen, it being on the inside of the curve, and in the exercise of ordinary care the said fireman could and should have discovered said rock on said track and adjacent to said rail and on top of said right hand rail (in the direction in which the train was going) and yet said fireman negligently failed to discover the same and negligently failed to warn the engineer of said obstruction, and had said fireman discovered said rock and warned said engineer at a distance of one hundred or more yards away, when he could have discovered said rock as the same was then visible, the said decedent would have been enabled to apply his brakes and stop the train before it finally left the track.

9. It is alleged that after striking said rock the front trucks left the rails but the engine was not derailed and continued to function apparently normally to the engineer and fireman was a distance of seven tenths (0.7) of a mile, at which point it struck a switch going out to the right from the track and in so striking the switch the front trucks were turned to the right and were obstructed and caused to be thrust under the engine, and this, together with the large axles and wheels of said trucks and its general obstruction in turning to the right on striking said switch, threw the entire engine off the track and caused it to turn over on its side after running about one hundred yards.

10. Plaintiff further alleges that said engine was equipped with what is called a watchman, which was an apparatus consisting of pipes, iron or steel contrivances, and other apparatus under the body of said engine extending from the back to the front end thereof, and consisting of cylinders, valves and other apparatus, including air, and which automatically, whenever said front wheels of said engine should leave the track, was designed, by means of a valve which was tripped by the derailment of said wheels, [fol. 18] to apply the air on the brakes of the entire train, and had said appliance known as a watchman been in repair, the speed of said train at said point would have stopped at a couple hundred yards, which would have been automatic and without any effort on the part of the engi-

neer, but the defendant on said occasion, before said engine left Birmingham, Alabama, failed to properly inspect said watchman to see that the same was in condition to work, and plaintiff alleges that the same was not in working or functioning order at the time of said derailment and the same failed to apply the brakes as was its design and purpose and as it would have done had the defendant exercised its duty of inspection under the body of said engine and had ascertained that said watchman was in repair before said trip from Birmingham to Atlanta. The same was not the duty of the decedent who had no concern or part therewith. Had the said watchman functioned, the train would have been stopped long before striking said right hand switch and turning over and the life of the decedent would have been saved.

11. Plaintiff also alleges that at a point about 25 or 35 feet west of the switch which turned to the right and at which point the engine began to turn over and finally did turn over, the cross ties were rotten and not securely ballasted and that the spikes were almost out of the plates and the rail was not secure, all of which contributed to the said final derailment after the engine had run said seven-tenths (0.7) of a mile.

12. Each and all of the foregoing negligent acts and omissions of said fireman and the defendant's other agents and servants herein described, and the defective conditions of defendant's engines, appliances, machinery and cars, due to its negligence, contributed to and caused the turning over of said engine and the escape of steam, fire and water therefrom and the crushing, mangling and killing of the dece- [fol. 19] dent, James Monroe Cox, who died from the injuries received after the turning over of said engine and because of said turning over within one hour therefrom.

13. Plaintiff brings this action under the Act of Congress of April 22, 1908, and all subsequent amendments thereto, regulating the liability of carriers engaged in interstate commerce to their employees, and plaintiff alleges that the said decedent was a widower, his wife having died several years before the decedent's death, and the said decedent left surviving him two children, one of whom is the plaintiff, Mrs. Olivia Cox Lunsford, and the other of whom is Hubert A. Cox, the said two children being his only surviving chil-

dren. Plaintiff alleges that the decedent's life was of great value to said children, and this action is brought by plaintiff as administratrix for the benefit of said children. The decedent was 59 years of age and had an expectancy in life of 14.92 years. His earnings were about $325.00 per month and said earnings would have continued throughout his entire expectancy. The said decedent contributed out of his said earnings for the benefit of his two surviving children the sum of $200.00 per month, which contributions would have kept up until his death, said contributions being in money, in services, in house rent, in contributions of property, groceries, automobiles, furniture, and in payment to employees for services rendered said two children. The said decedent was healthy and able-bodied and had no one on whom, outside of his own personal expenses, to spend his money except said two children, and damages are laid at the aforesaid sum of $50,000.00.

Wherefore plaintiff prays process may issue requiring the defendant to be and appear at the next term of this court to answer plaintiff's complaint.

Arnold, Arnold & Gambrell, Attorneys for Plaintiff.

[fol. 20] In Superior Court of Haralson County

Summons and Sheriff's Return—Filed April 12, 1933

To the Sheriff of said County and His Lawful Deputies—Greeting:

Mrs. Olivia Cox Lunsford, Administratrix of Estate of James Monroe Cox

vs.

Southern Railway Company

Complaint for Damages

The defendant, Southern Railway Company, is hereby required personally or by attorney to be and appear at the Superior Court, to be held in and for said County on the 3rd Monday in July next, then and there to answer the Plaintiff's demand in an action of complaint, as in default

thereof the Court will proceed as to justice shall appertain.

Witness the Honorable J. R. Hutcheson, Judge of the said Court, this 12 day of April, 1933.

S. O. Smith, Clerk.

I have this day served the defendant, Southern Railway Company, a corporation, by serving copy of within petition and process personally upon R. L. Fields depo- agent of the said defendant, Southern Railway Company, at Bremen, Haralson County, Georgia, at the usual and ordinary place of doing business of said corporation in said County of Haralson, State of Georgia.

This 14 day of April, 1933.

L. J. White, Sheriff.

Filed in office April 12th, 1933.

S. O. Smith, Clerk.

[fol. 21] In Superior Court of Haralson County

Original Answer of the Defendant—Filed Aug. 16, 1933

Now comes Southern Railway Company defendant in above stated cause, and, in answer to the petition, says:

1st. For the want of sufficient information, defendant can neither admit nor deny the averments of the first paragraph of the first count of the petition.

2nd. The averments of the second paragraph of the first count of the petition are admitted.

3rd. The averments of the third paragraph of the first count of the petition are denied.

4th. The averments of the fourth paragraph of the first count of the petition are admitted.

5th. Answering the averments of the fifth paragraph of the first count of the petition this defendant says that at or about the time and place stated, and while rounding a curve on defendant's tracks, the wheels of the front truck of the engine struck a rock which had been placed on the track

by someone without the knowledge of this defendant or any of its employees, and were thrown from the rails, while the drivers and other wheels of said engine remained on the track. The said front trucks were out of view of the engineer and fireman, and said trucks were suspended in such a way that they could be suspended from the body of the engine and the engine still continue to function normally for a short distance. Except as answered it can neither admit nor deny the averments of said fifth paragraph of the first count of the petition for the want of sufficient information.

6th. Answering the sixth paragraph of the first count of the petition, this defendant says that its investigation of the condition after the derailment of said engine showed that after the wheels of said trucks under the front end of the engine left the rail it ran for a distance of approximately seven tenths (7/10) of a mile until it reached a switch going out to the right from the main line, at which point [fol. 22] said engine was derailed and turned over. Apparently said front wheels of said truck were off the track from the time the same struck the rock as hereinbefore referred to, and apparently when said front wheels struck the switch they were thrown to one side, and derailed and turned over the engine. In said derailment, James M. Cox, the engineer in charge of said engine, was so injured that he died within about one hour. Except as answered, the averments of said paragraph can neither be admitted nor denied for the want of sufficient information.

7th. The averments of the seventh paragraph of the first count of the petition are denied.

8th. The averments of the eighth paragraph of the first count of the petition are denied.

9th. Answering the ninth paragraph of the first count of the petition, defendant says that said trucks struck said rock on the track at a point approximately one and thirty-five hundredths (1.35) miles west of the station at Bremen on a rather sharp curve to the left in the direction in which the engine was going, and it assumes that the decedent was on his seat box on the right side of the engine, which would have placed him on the outside of the curve. Its information is that said train was proceeding at the regular sched-

ule of speed. Except as answered, the averments of said ninth paragraph of the first count of the petition are denied.

10th. Answering the tenth paragraph of the first count of the petition, this defendant says that the iron plates on the ties on the outside of said rail had openings or holes for two spikes, and that there was a spike in only one of said openings, all of which was usual and customary, not only at that point, but at all other points along its line of railway, and is the usual and customary way for said plates to be spiked. Except as answered, the averments of said [fol. 23] tenth paragraph of the first count of the petition are denied.

11th. The averments of the eleventh paragraph of the first count of the petition are denied.

12th. The averments of the twelfth paragraph of the first count of the petition are denied.

13th. The averments of the thirteenth paragraph of the first count of the petition are denied.

14th. The averments of the fourteenth paragraph of the first count of the petition are denied.

15th. Answering the fifteenth paragraph of the first count of the petition, this defendant says that said engine was equipped with an experimental device known as "Wright's Little Watchman", which was attached to certain apparatus connected with said engine, and which was so designed that under certain conditions the derailment of the front truck wheels would trip a valve and thereby apply the air on the brakes of the train. It says that the same was in good condition on said engine at the time but apparently the proper conditions did not develop which would cause the tripping of said valve and the application of said brake. It says that the same is merely an experimental device which will not operate at all times when said truck wheels leave the track, but will operate only when conditions develop which will trip the same. It says further that said device is not in use on all railroads, and is not required to be used under the Safety Appliance Act of Congress, or any regulations made in pursuance thereof. It says further that it was no part of the duty of James M. Cox to inspect the same. Ex-

cept as answered, the averments of said fifteenth paragraph of the first count of the petition are denied.

16th. The averments of the sixteenth paragraph of the first count of the petition are denied.

17. The averments of the seventeenth paragraph of the first count of the petition are denied.

[fol. 24] 18th. For the want of sufficient information, it can neither admit nor deny the averments of the eighteenth paragraph of the first count of the petition, except it does deny that the earnings of the decedent averaged the sum of Three Hundred Twenty-five Dollars ($325.00) per month, and it denies that it is liable to the plaintiff for damages in the sum claimed, or in any other sum.

And having answered fully said first count of the petition, defendant prays to be hence discharged.

Griffith & Matthews, Maddox, Matthews & Owens,
Defendant's Attorneys.

And, for answer to said second count of the petition, this defendant says:

1st. For the want of sufficient information it can neither admit nor deny the averments of the first paragraph thereof.

2nd. It admits the averments of the second paragraph thereof.

3rd. It denies the averments of the third paragraph thereof.

4th. It admits the averments of the fourth paragraph thereof.

5th. Answering the fifth paragraph thereof, defendant says that on the date and at the place mentioned, the said James M. Cox was the engineer in charge of the locomotive pulling its passenger train No. 40 from Birmingham, Alabama to Atlanta, Georgia, and that when said engine reached the point approximately as stated the front trucks of the engine struck a rock which had been placed on top of one of the rails, being the outside rail on a curve, and the front trucks of the locomotive were derailed. It says that said rock was placed on said track by some miscreant without its knowledge or consent just a short while prior

[fol. 25] to the arrival of said train at said point. Except as answered, the averments of said fifth paragraph of the second count of the petition are denied.

6th. The averments of the sixth paragraph thereof are denied.

7th. The averments of the seventh paragraph thereof are denied.

8th. Answering the averments of the eighth paragraph thereof, this defendant says that the point where said rock was on said track was on a curve to the left, and that the engineer's duties placed him on the outside of the curve. It denies that said curve extended for anything like three hundred (300) yards. It assumes that the fireman was at some point on the left side of said engine in the performance of his duties. It admits that said engine was provided with an automatic stoker which fired the same by machinery, the valves of which were operated by the fireman. Except as answered, the averments of said eighth paragraph of the second count of the petition are denied.

9th. Answering the ninth paragraph of the second count of the petition, this defendant says that its investigation of the condition after the derailment of said engine showed that after the wheels of said truck under the front end of the engine left the rail it ran for a distance of approximately seven tenths (7/10) of a mile until it reached a switch going out to the right from the main line, at which point said engine was derailed and turned over. Apparently said front wheels of said truck were off the track from the time the same struck the rock as hereinbefore referred to, and apparently when said front wheels struck the switch they were thrown to one side, and derailed and turned over the engine. Except as answered, the averments of said paragraph can neither be admitted nor denied for the want of sufficient information.

[fol. 26] 10th. Answering the tenth paragraph of the second count of the petition, this defendant says that said engine was equipped with an experimental device known as "Wright's Little Watchman," which was attached to certain apparatus connected with said engine, and which was so designed that under certain conditions the derailment of the front truck wheels would trip a valve and

thereby apply the air on the brakes of the train. It says that the same was in good condition on said engine at the time, but apparently the proper conditions did not develop which would cause tripping of said valve and the application of said brake. It says that the same is merely an experimental device, which will not operate at all times when said truck wheels leave the track, but will operate only when conditions develop which will trip the same. It says further that said device is not in use on all railroads, and is not required to be used under the Safety Appliance Act of Congress, or any regulations made in pursuance thereof. It says further that it was not part of the duty of James M. Cox to inspect the same. Except as answered, the averments of said tenth paragraph of the second count of the petition are denied.

11th. The averments of the eleventh paragraph thereof are denied.

12th. The averments of the twelfth paragraph thereof are denied, except it admits that when said engine was derailed and overturned, the decedent, James M. Cox, was so injured that he died shortly thereafter.

13th. For the want of sufficient information, it can neither admit nor deny the averments of the thirteenth paragraph thereof, except it does deny that the earnings of the decedent averaged the sum of Three Hundred Twenty-five Dollars ($325.00) per month, and it denies that it is liable to the plaintiff for damages in the sum claimed or in any other sum.

[fol. 27] And having answered fully said second count of the petition, defendant prays to be hence discharged.

Griffith & Matthews, Maddox, Matthews & Owens,
Defendant's Attorneys.

[File endorsement omitted.]

IN SUPERIOR COURT OF HARALSON COUNTY

DEFENDANT'S ORIGINAL DEMURRER TO PLAINTIFF'S PETITION —Filed Aug. 16, 1933

Now comes Southern Railway Company, defendant in above stated case, and demurs to the first count of said petition, on the grounds:

1st. That the averments thereof are insufficient and fail to set forth any cause of action against this defendant.

2nd. That the averments thereof are insufficient to show any right of recovery for the use and benefit of the said Mrs. Olivia Cox Lunsford or the said Hubert A. Cox, there being no averment that they were minors or in any way dependent upon the said James M. Cox.

3rd. It demurs specially to the averments of the eighth paragraph of the first count of the petition on the ground that the same is vague, indefinite and uncertain, in that it fails to set forth, or to describe the defects and insufficiencies therein referred to, or to set forth how, or in what way there was any negligence on the part of this defendant as to its engine appliances, track or roadbed.

4th. It demurs specially to the averments of the ninth paragraph of the first count of the petition, to-wit: "The track did not have sufficient elevation on the right hand side going east to render it safe to propel an engine weigh-[fol. 28] ing in the neighborhood of two hundred tons, as did the engine in question, over said point"; and to the further allegation: "that for an engine of that weight the elevation of the track was insufficient on said outside or right hand side in the direction in which it was going," on the grounds:

(a) That the same are respectively mere conclusions of the pleader and set forth no issuable facts.

(b) That such averments are vague, indefinite and uncertain, in that they do not allege what elevation on the right hand side going east was necessary in order to render the track safe for an engine of the kind described, or what elevation of the track there was on that side, or how or in what way, or to what extent the elevation thereof was insufficient.

(c) That there are no averments in said paragraph, or elsewhere in said first count of the petition, showing or tending to show how, or in what way the alleged insufficient elevation of the outside rail proximately caused or contributed to the derailment of the trucks of said engine.

5th. It demurs specially to the several averments of the tenth paragraph of said first count of the petition, on the grounds:

(a) That the averment thereof to the effect that the rails and track were not firm and secure is a mere conclusion of the pleader and sets forth no issuable facts.

(b) That the averment thereof with respect to insufficient bracing is a mere conclusion of the pleader and sets forth no issuable facts.

(c) That the averment as to insufficiency of the spiking is a mere conclusion of the pleader and sets forth no issuable facts.

(d) That the averment as to the insecurity of the track is a mere conclusion of the pleader and sets forth no issuable facts.

[fol. 29] (e) That the averment that the matters therein referred to "allowed the said rails to yield to the pressure of a heavy train at said point, which caused a certain amount of looseness and vibration in the rail and caused the same to give at the top and to have a tendency to give and thus enable the flange of a wheel to ride over the rail at said point", sets forth mere conclusions of the pleader, without any issuable facts in support thereof; that the same are vague, indefinite and uncertain, in that it is not alleged to what extent said track would yield to the pressure of the train, how much looseness or vibration in the rail was caused to what extent the rails were caused to give at the top, or how, or in what way these several matters would enable the flange of a wheel to ride over the top of the rail.

(f) That there are no averments in said paragraph, or elsewhere in the first count of the petition, showing that the matters and things therein referred to proximately caused the derailment of the front trucks of said engine, or why, if the same did cause the derailment of the front trucks, it did not also cause the derailment of the other wheels and drivers of the engine at that point.

6th. It demurs specially to the averments of the eleventh paragraph of the first count of the petition, on the grounds:

(a) That the averment to the effect that the cross ties were out of condition is a mere conclusion of the pleader and sets forth no issuable fact, and is vague, indefinite and

uncertain as to how or in what respect the same were out of condition.

(b) That the averments to the effect that the rotten condition of said ties allowed said spikes to have play and room and the same were not tight, and allowed the rail to vibrate and cause the top thereof to give and to allow the [fol. 30] the flange of a wheel to climb over the same, set forth a mere series of conclusions, unsupported by any specific averments of fact, particularly as to how there was any proximate connection between the several results therein averred; that the same are vague, indefinite and uncertain in that it is not alleged to what extent the spikes had play and room and were not tight, or how or in what way the fact that the spikes were not tight caused or tended to cause the top of the rail to give and allow the flange of a wheel to climb over the same.

7th. It demurs specially to the averments of the twelfth paragraph of the first count of the petition, on the grounds:

(a) That the averment that said spikes had worked up to a point above the flange of the rail and did not come in close and tight contact with the same so as to make the same secure, is a mere conclusion of the pleader, and is vague, indefinite and uncertain in that it is not alleged to what extent the spikes had worked up.

(b) That the averment that there was a space between the head of the spikes and the bottom flange of the rail which allowed play and vibration and looseness and insecurity in said rail, and which had a tendency to and did cause said front trucks to mount the outside of said rail and ride over the same, is a mere series of conclusions of the pleader, unsupported by any specific averment of fact; that the same is vague, indefinite and uncertain in that there is no averment as to the extent of the space between the head of the spikes and the bottom flange of the rail, to what extent this allowed play and vibration and looseness and insecurity in the rail, or how or in what way this had a tendency to and caused the said front trucks to mount the outside of said rail and ride over the same; or how, or in what way, if there was such a tendency and such mat- [fol. 31] ters did cause the front trucks to mount the outside of said rail and ride over the same, it did not also

cause the drivers and other wheels of the engine to mount and ride over the same.

8th. It demurs specially to the averments of the thirteenth paragraph of the first count of the petition, on the grounds:

(a) That the averment as to the insufficiency of the out or bearing rail is a mere conclusion of the pleader and sets forth no issuable facts.

(b) That it is not alleged in said paragraph, or elsewhere in the first count of the petition, how or in what way the insufficiency of said rail, as therein referred to, caused said trucks to mount the rail and the right hand wheel thereof to go off on the outside, there being no averments showing how or in what way the matters and things referred to proximately caused or tended to cause said trucks to mount said rail.

9th. It demurs specially to the averments of the fourteenth paragraph of the first count of the petition, on the grounds:

(a) That the several clauses thereof respectively are mere conclusions of the pleader, and set forth no issuable facts.

(b) That there are no averments showing how, or in what way the front wheels of said engine were out of condition, and such an averment is vague, indefinite and uncertain for such reasons.

(c) That there are no averments showing or tending to show how, or in what respect the shop authorities of the defendant were negligent in allowing the same to go in service on said date, and the same is a mere conclusion and is vague, indefinite and uncertain in the respects stated.

[fol. 32] (d) That there are no averments showing or tending to show how or in what way the fact that the front wheels of the engine were sharp and/or out of condition proximately caused or tended to cause said truck wheels to mount and ride over the rail.

10th. It demurs specially to the averments of the fifteenth paragraph of the fifth count of the petition, on the grounds:

(a) That the averments thereof with respect to the watchman and the description thereof, and the manner in which it is claimed it would operate, *or* insufficient, vague, and indefinite, and fail to put this defendant upon notice of how or in what way it was claimed there was any negligence with respect thereto.

(b) That there are no averments showing or tending to show that said watchman was an appliance or safeguard required under the Federal Safety Appliance Act of Congress, nor is there any averment showing or tending to show that the same was in customary and general use on first class railroads, nor is there any averment showing or tending to show that the same would, in all cases, operate or function when the front truck wheels of an engine left the track.

(c) That the failure of said watchman to function was not the proximate cause of the death of the decedent or proximately connected therewith, especially in view of the averments of said paragraph and the remainder of said first count of the petition.

(d) That there are no averments showing or tending to show any duty on the part of the defendant to have or use said watchman on its engine or to keep the same in repair; and in the absence thereof, the condition thereof, and its failure to operate are wholly immaterial and irrelevant, and are not negligence on the part of this defendant.

11th. It demurs specially to the averments of the sixteenth [fol. 33] paragraph of the first count of the petition, on the grounds:

(a) That the averments that the cross ties were not securely ballasted and the rail was not secure, are mere conclusions of the pleader, and set forth no issuable facts, and are vague, indefinite and uncertain, in that it is not alleged how, or in what respect the cross ties were not securely ballasted and the rails were not secure.

(b) That the same is vague, indefinite and uncertain in that it is not alleged how, or in what way the matters therein referred to proximately contributed to the final derailment of said engine.

(c) That the same is contradictory to the averments of the sixth paragraph of the first count of the petition, to the effect that the derailment of the engine was caused by the trucks striking the switch, the effect of which was to throw the trucks and wheels to one side and under the engine and obstruct its progress and to cause it to leave the rail and become unbalanced and turn over.

12th. It demurs specially to the averments of the seventeenth paragraph of the petition, on the grounds:

(a) That the same is a mere conclusion of the pleader and sets forth no issuable facts.

(b) That the same is vague, indefinite and uncertain, in that it is not alleged how, or in what respect this defendant was guilty of any negligent acts and omissions, or how, or in what way there was any defective and insufficient conditions of its engines, appliances, machinery, track and roadbed.

Wherefore, the premises considered, defendant prays that its said demurrers be inquired into by the court, that the same be sustained and said first count of the petition dismissed.

Griffith & Matthews, Maddox, Matthews & Owens, Defendant's Attorneys.

[fol. 34] And, for demurrer to the second count of the petition, defendant says:

1st. That the averments thereof are insufficient to set forth any cause of action against this defendant, or to show any actionable negligence on the part of this defendant.

2nd. That the averments thereof are insufficient to show any right of recovery for the use and benefit of said Mrs. Olivia Cox Lunsford or Hubert A. Cox, it not being alleged that they were minors or in any way dependent upon the said James M. Cox.

3rd. It demurs specially to the averment of the fifth paragraph of said count of the petition, to the effect that the engine struck a rock or other object, negligently allowed by the defendant to be on said track and adjacent to the rails thereof, etc., on the grounds:

(a) That the same is a mere conclusion of the pleader, especially in so far as it undertakes to charge negligence against this defendant.

(b) That the same is vague, indefinite and uncertain in that it is not alleged how, or in what respect this defendant was negligent.

(c) That the same is vague, indefinite, uncertain and insufficient, in that there is no averment showing or tending to show that this defendant or any of its employees placed said rock or other object on the track, or had any knowledge or notice that it was on the track.

(d) That the same is vague, indefinite and uncertain, in that it is not alleged what employee or employees of this defendant allowed said rock or other object to remain on the track, or had any knowledge or notice that it was on the track.

4th. It demurs specially to the averments of the sixth paragraph of the second count of the petition, on the grounds:

[fol. 35] (a) That the same is a mere conclusion of the pleader, especially in so far as it undertakes to charge negligence against this defendant.

(b) That the same is vague, indefinite and uncertain in that it is not alleged how, or in what respect this defendant was negligent.

(c) That the same is vague, indefinite, uncertain and insufficient, in that there is no averment showing or tending to show that this defendant or any of its employees placed said rock or other obstruction on the track, or had any knowledge or notice that it was on the track.

(d) That the same is vague, indefinite and uncertain, in that it is not alleged what employee or employees of this defendant allowed said rock or other obstruction to remain on the track, or had any knowledge or notice that it was on the track.

5th. It demurs specially to the averments of the seventh paragraph thereof, on the grounds:

(a) That the averments thereof, to the effect that defendant's section hands and section foreman were negligent in failing to properly inspect said track at said point, is a mere conclusion of the pleader and fails to set forth how, or in what respect they were negligent.

(b) That the averments thereof to the effect that said curve was dangerous is a mere conclusion of the pleader, and is vague, indefinite and uncertain, in that there are no averments as to how, or in what respect it was dangerous.

(c) That said paragraph as a whole is vague, indefinite and uncertain, in that it fails to set forth what would be a proper inspection of the track, and how, or in what respect it was not properly inspected.

6th. It demurs specially to the averments of the eighth paragraph thereof, on the grounds:

[fol. 36] (a) That the same are wholly insufficient to show any actionable negligence on the part of the fireman.

(b) That there are no averments showing or tending to show that said fireman discovered or had any knowledge that said rock was on the track.

7th. It demurs specially to and moves to strike the tenth paragraph thereof, on the grounds:

(a) That the averments thereof with respect to the watchman and the description thereof, and the manner in which it is claimed it would operate, are insufficient, vague, and indefinite, and fail to put this defendant upon notice of how or in what way it was claimed there was any negligence with respect thereto.

(b) That there are no averments showing or tending to show that said watchman was an appliance or safeguard required under the Federal Safety Appliance Act of Congress, nor is there any averment showing or tending to show that the same was in customary and general use on first class rail roads, nor is there any averment showing or tending to show that the same would, in all cases, operate or function when the front truck wheels of an engine left the track.

(c) That the failure of said watchman to function was not the proximate cause of the death of the decedent or proximately connected therewith, especially in view of the averments of said paragraph and the remainder of said second count of the petition.

(d) That there are no averments showing or tending to show any duty on the part of the defendant to have or use said watchman on its engine or to keep the same in repair; and in the absence thereof, the condition thereof, and its failure to operate are wholly immaterial and irrelevant, and are not negligence on the part of this defendant.

[fol. 37] 8th. It demurs specially to and moves to strike the averments of the eleventh paragraph thereof, on the grounds:

(a) That the averments that the cross ties were not securely ballasted and the rail was not secure, are mere conclusions of the pleader, and set forth no issuable facts, and are vague, indefinite and uncertain, in that it is not alleged how, or in what respect the cross ties were not securely ballasted and the rails were not secure.

(b) That the same is vague, indefinite and uncertain, in that it is not alleged how, or in what way the matters therein referred to proximately contributed to the final derailment of said engine.

9th. It demurs specially to the averments of the twelfth paragraph of the petition, on the grounds:

(a) That the same is a mere conclusion of the pleader and sets forth no issuable facts.

(b) That the same is vague, indefinite and uncertain, in that it is not alleged how, or in what respect this defendant was guilty of any negligent acts and omissions, or how, or in what way there was any defective and insufficient conditions of its engine, appliances, machinery, track and roadbed.

Wherefore, the premises considered, defendant prays that these its grounds of demurrer to the second count of the petition be sustained and that the same be stricken.

Griffith & Matthews, Maddox, Matthews & Owens,
Defendant's Attorneys.

[File endorsement omitted.]

[fol. 38] In Superior Court of Haralson County

First Amendment to Plaintiff's Petition

Plff. amends paragraph 8 of 1st count of the petition by adding the words: "as hereinafter stated".
This Nov. 18, 1933.
Arnold, Gambrell & Arnold, Plff's. Attys.

The foregoing amendment by plaintiff is hereby allowed. Nov. 18, 1933.

J. R. Hutcheson, Judge S. C. Tal. Co.

In Superior Court of Haralson County

Order on Defendant's Demurrer—Filed Nov. 18, 1933

After hearing the argument the within and foregoing demurrer is hereby overruled as to each and every ground therein contained.
This Nov. 18, 1933.

J. R. Hutcheson, Judge S. C. Tal. Co.

[File endorsement omitted.]

In Superior Court of Haralson County

Bill of Exceptions Pendente Lite Filed by Defendant on the 14th Day of December, 1933 and Order

State of Georgia,
Haralson County:

Be it remembered, that on the 12th day of April, 1933, Mrs. Olivia Cox Lunsford, Administratrix of the Estate of James Monroe Cox, filed her suit against the Southern Railway Company in the Superior Court of Haralson County, Georgia, said suit being numbered 2229 and made returnable to the July Term, 1933, of said Court; said suit [fol. 39] being a suit brought in two counts for the sum of Fifty Thousand Dollars ($50,000.00) on account of the death of James Monroe Cox, alleged to have been caused by the

negligence of the defendant; that thereafter, within the time provided by law, and on August 16th, 1933, the defendant filed its answer and demurrer to the petition filed in said case; all as shown by the record in said case; that thereafter, on November 18th, 1933, plaintiff amended said petition, which amendment was allowed on November 18, 1933; that thereafter said petition as amended and the demurrer thereto came on to be heard before the Superior Court of said county, the Honorable J. R. Hutcheson, Judge of said Court, then and there presiding, and, after argument of counsel, the Court passed its order overruling said demurrer, said order being in words and figures as follows, to-wit:

"After hearing the argument the within and foregoing demurrer is hereby overruled as to each and every ground therein contained.

This Nov. 18, 1933.

J. R. Hutcheson, Judge S. C. Tal. C."

To this ruling and judgment of court overruling its demurrer, the defendant, Southern Railway Company, then and there excepted and now excepts and assigns error thereon, and says that the court erred in overruling said demurrer on each and all of the grounds therein contained.

And now, within the time provided by law, and within thirty days of the date of the order overruling said demurrer, comes defendant, Southern Railway Company, and tenders this its bill of exceptions pendente lite and prays that the same may be certified in accordance with law, and made a part of the record in said case.

This the 8th day of December, 1933.

Walter Matthews, E. S. Griffith, Maddox, Matthews & Owens, Attorneys for Defendant, Southern Railway Company.

[fol. 40] I hereby certify that the above and foregoing bill of exceptions pendente lite are true. Let the same be filed as a part of the record in said case.

This the 9th day of December, 1933.

J. R. Hutcheson, J. S. C. T. C.

[File endorsement omitted.]

IN SUPERIOR COURT OF HARALSON COUNTY

SECOND AMENDMENT TO PLAINTIFF'S PETITION—Filed Jan. 15, 1934

Amending the first count in the petition in the case above stated, the plaintiff alleges the following as a distinct and separate paragraph:

That the safety chains attached to the front end of the truck on the engine which became derailed in this case were too short by from eight to fifteen inches, and did not have sufficient play to meet the exigencies of the swaying movements of the engine around curves and other portions of the track, and said short safety chains operated to pull up the truck at the curve where the same was first derailed so as to contribute to and be one of the causes of the wheels of said front truck leaving the rails, and plaintiff alleges that the said chains were a part of said locomotive and were an appurtenance thereof and were not in proper condition and safe to operate in the service to which the same were put, without unnecessary peril to life or limb, and that the same did not function properly.

Plaintiff also alleges that the defendant and its agents and servants placed said chains upon said engine, knew thereof, and were negligent in so constructing and placing the same as herein described, but plaintiff alleges this negligence as a cumulative and an additional fact and alleges that said chains being a part and appurtenance of the [fol. 41] boiler, the defendant is responsible for injuries proximately resulting from said condition, which was not a proper condition and which rendered the said chains not safe to operate in the service to which they were put.

This allegation is made in connection with all of the other allegations in said first count, all of which are still insisted on.

Amending the second count in said petition, the plaintiff alleges the following as a distinct and separate paragraph:

That the safety chains attached to the front end of the truck on the engine which became derailed in this case were too short by from eight to fifteen inches, and did not have sufficient play to meet the exigencies of the swaying movements of the engine around curves and other portions of the track, and said short safety chains operated to pull up

the truck at the curve where the same was first derailed so as to contribute to and be one of the causes of the wheels of said front truck leaving the rails, and plaintiff alleges that the said chains were a part of said locomotive and were an appurtenance thereof and were not in proper condition and safe to operate in the service to which the same were put, without unnecessary peril to life or limb, and that the same did not function properly.

Plaintiff also alleges that the defendant and its agents and servants placed said chains upon said engine, knew thereof, and were negligent in so constructing and placing the same as herein described, but plaintiff alleges this negligence as a cumulative and an additional fact and alleges that said chains being a part and appurtenanec of the boiler, the defendant is responsible for injuries proximately resulting from said condition, which was not a proper condition and which rendered the said chains not safe to operate in the service to which they were put.

[fol. 42] This allegation is made in connection with all of the other allegations in said second count, all of which are still insisted on.

Arnold, Gambrell & Arnold, Plaintiff's Attorneys.

The foregoing amendment is hereby allowed and ordered filed and served, subject to the defendant's right to object or demur thereto.

This December 14, 1933.

J. R. Hutcheson, Judge, Superior Courts, Tallapoosa Circuit.

Service of the foregoing amendment and order, by copy, acknowledged.

This December 15th, 1933.

Maddox, Matthews & Owens, Attorney- for Defendant.

[File endorsement omitted.]

IN SUPERIOR COURT OF HARALSON COUNTY

DEFENDANT'S DEMURRER TO SECOND AMENDMENT TO PLAINTIFF'S PETITION—Filed Dec. 30, 1933

Now comes Southern Railway Company, defendant in above stated cause, and demurs to the amendment to the

petition allowed by the Court on December 14, 1933, and, for grounds thereof, says:

1st. It demurs to the averments of said amendment to the first count of said petition, on the grounds:

(a) That said averments, and each and every clause thereof separately, are mere conclusions of the pleader and set forth no issuable facts.

[fol. 43] (b) That the averment to the effect that the safety chains therein referred to "were too short by from eight to fifteen inches" is a mere conclusion of the pleader and sets forth no issuable facts, and is indefinite, uncertain and evasive in that it is not alleged what the length of said chains were, nor is it alleged what the length of such chains should have been.

(c) That the averment to the effect that said safety chains did not have sufficient play to meet the exigencies of the swaying movements of the engine curves and other portions of the track is a mere conclusion of the pleader and sets forth no issuable fact, and is indefinite and evasive, in that it fails to set forth how much play the same had and how much they should have had.

(d) It demurs specially to the averments to the effect that said short chains operated to pull up the truck at the curve where the same was first derailed so as to contribute to and be one of the causes of the wheels of said front truck leaving the rails is a mere conclusion of the pleader and sets forth no issuable facts, and is indefinite, uncertain and evasive in that it fails to set out how or in what way said safety chains had the effect as therein claimed.

(e) It demurs specially to the averments to the effect that this defendant, its agents and servants were negligent in so constructing and placing the chains upon said engine as described in said amendment, on the grounds that the same are mere conclusions of the pleader and set forth no issuable facts, and is indefinite, uncertain and evasive in that there are no averments showing or tending to show how or in what way the constructing and placing of said chains as described was negligence on the part of this defendant or any of its employees, or how or in what way the same proximately caused or contributed to causing the derail-
[fol. 44] ment of said engine.

(f) That the averments to the effect that the condition of said chains "was not a proper condition and which rendered the chains not safe to operate in the service to which they were put" are mere conclusions of the pleader and set forth no issuable facts, and are vague, indefinite, uncertain and evasive in that it is not alleged how or in what way they were not in a proper condition, or how or in what way the condition referred to rendered said chains not safe to operate in the service to which they were put.

(g) That there are no averments showing or tending to show that said chains were required as a part of said locomotive or its equipment under the Safety Appliance Act or the Boiler Inspection Act of Congress, or any of the regulations or orders of the Interstate Commerce Commission adopted in pursuance of either of said Acts; and there are no averments showing or tending to show that the length of said chains as used on said engine was in any way a violation of any of said requirements under said Acts of Congress and the rules and regulations and orders of the Interstate Commerce Commission, made in pursuance thereof.

2nd. It demurs to the averments of said amendment to the second count of said petition, on the grounds:

(a) That said averments, and each and every clause thereof separately, are mere conclusions of the pleader and set forth no issuable facts.

(b) That the averment to the effect that the safety chains therein referred to "were too short by from eight to fifteen inches" is a mere conclusion of the pleader and sets forth no issuable facts, and is indefinite, uncertain and evasive in that it is not alleged what the length of said chains were, nor is it alleged what the length of such chains should have been.

[fol. 45] (c) That the averment to the effect that said safety chains did not have sufficient play to meet the exigencies of the swaying movements of the engine around curves and other portions of the track is a mere conclusion of the pleader and sets forth no issuable fact, and is indefinite and evasive, in that it fails to set forth how much play the same had and how much they should have had.

(d) It demurs specially to the averments to the effect that said short chains operated to pull up the truck at the curve where the same was first derailed so as to contribute to and be one of the causes of the wheels of said front truck leaving the rails is a mere conclusion of the pleader and sets forth no issuable facts, and is indefinite, uncertain and evasive in that it fails to set out how or in what way said safety chains had the effect as therein claimed.

(e) It demurs specially to the averments to the effect that this defendant, its agents and servants were negligent in so constructing and placing the chains upon said engine as described in said amendment, on the grounds that the same are mere conclusions of the pleader and set forth no issuable facts, and is indefinite, uncertain and evasive in that there are no averments showing or tending to show how or in what way the constructing and placing of said chains as described was negligence on the part of this defendant or any of its employees, or how or in what way the same proximately caused or contributed to causing the derailment of said engine.

(f) That the averments to the effect that the condition of said chains "was not a proper condition and which rendered the chains not safe to operate in the service to which they were put" are mere conclusions of the pleader and set forth no issuable facts, and are vague, indefinite, uncertain and evasive in that it is not alleged how or in what way they were not in a proper condition, or how or in what way [fol. 46] the condition referred to rendered said chains not safe to operate in the service to which they were put.

(g) That there are no averments showing or tending to show that said chains were required as a part of said locomotive or its equipment under the Safety Appliance Act or the Boiler Inspection Act of Congress, or any of the regulations or orders of the Interstate Commerce Commission adopted in pursuance of either of said Acts; and there are no averments showing or tending to show that the length of said chains as used on said engine was in any way a violation of any of said requirements under said Acts of Congress and the rules and regulations and orders of the Interstate Commerce Commission, made in pursuance thereof.

(h) That the averments of said amendment are vague, indefinite, uncertain and evasive in that said averments are wholly insufficient to show how or in what way the shortness of said chains proximately caused or contributed to causing the derailment of said trucks, all averments with reference thereto being mere conclusions, without any definite statement of fact.

Wherefore, the premises considered, defendant prays that these its grounds of demurrer be inquired into by the Court, that the same be sustained and said petition dismissed.

Griffith & Matthews, Maddox, Matthews & Owens,
Defendant's Attorneys.

[File endorsement omitted.]

[fol. 47] In Superior Court of Haralson County

Order on Defendant's Demurrer to Plaintiff's Second Amendment to the Petition—Filed Jan. 15, 1934

After hearing argument the within demurrer is overruled.

This 15th day of January, 1934.

J. R. Hutcheson, Judge, S. C. T. C.

[File endorsement omitted.]

In Superior Court of Haralson County

Bill of Exceptions Pendente Lite—Filed by Defendant on the 22nd Day of January, 1934

State of Georgia,
Haralson County:

Be it remembered, that on the 12th day of April, 1933, Mrs. Olivia Cox Lunsford, administratrix of the estate of James Monroe Cox, filed her suit against the Southern Railway Company in the Superior Court of Haralson County, Georgia, said suit being numbered 2229 and made returnable to the July Term, 1933, of said Court; said suit being

a suit brought in two counts for the sum of Fifty Thousand Dollars ($50,000.00) on account of the death of James Monroe Cox, alleged to have been caused by the negligence of the defendant; that thereafter, within the time provided by law, and on August 16, 1933, the defendant filed its answer and demurrer to the petition filed in said case; as shown by the record in said case; that thereafter, on November 18, 1933, plaintiff amended said petition, which amendment was allowed on November 18, 1933, and thereafter said petition as amended and the demurrer thereto came on to be heard before the Superior Court of said County, the Honorable J. R. Hutcheson, Judge of said Court, then and there [fol. 48] presiding, and, after argument of counsel, the Court passed its order overruling said demurrer, to which ruling defendant filed its exceptions pendente lite.

Be it further remembered, that thereafter, on December 14, 1933, plaintiff amended her petition by an amendment allowed subject to demurrer on said 14th day of December, 1933, and filed on January 15, 1934; to said amendment so filed the defendant, Southern Railway Company, filed its demurrer on January 15, 1934, which demurrer to the amendment came on to be heard before the Superior Court of Haralson County, Georgia, the Honorable J. R. Hutcheson, Judge of said Court, then and there presiding, and, after argument of counsel, the Court passed its order overruling said demurrer, said order being in words and figures as follows, to-wit:

"After hearing argument the within demurrer is overruled, this 15th day of January 1934.

J. R. Hutcheson, Judge S. C. T. C."

To this ruling and judgment of the court overruling its demurrer to said amendment to the petition, the defendant, Southern Railway Company, then and there excepted and now excepts and assigns error thereon, and says that the Court erred in overruling said demurrer on each and all of the grounds therein contained.

And now, within the time provided by law, and within thirty days of the date of the order overruling said demurrer, comes defendant, Southern Railway Company, and tenders this its bill of exceptions pendente lite and prays

that the same may be certified in accordance with law, and made a part of the record in said case.

This the 22 day of January, 1934.

Walter Matthews, E. S. Griffith, Maddox, Matthews & Owens, Attorneys for Defendant, Southern Railway Company.

[fol. 49] I hereby certify that the above and foregoing bill of exceptions pendente lite are true. Let the same be filed as a part of the record in said case.

This the 22 day of January, 1934.

J. R. Hutcheson, J. S. C. T. C.

[File endorsement omitted.]

In Superior Court of Haralson County

Verdict of the Jury

We, the jury, find for the plaintiff in the sum of Five Thousand ($5,000) Dollars.

This January 16th, 1934.

J. W. Hildebrand, Foreman.

In Superior Court of Haralson County

Judgment of the Court

Whereupon it is considered, ordered and adjudged that the plaintiff have and recover of the defendant the sum of $5,000.00 with $—— costs. Jan'y 16th, 1934.

J. R. Hutcheson, J. S. C. T. Co.

[fol. 50] In Superior Court of Haralson County

Motion for New Trial and Order Thereon—Filed Jan. 22, 1934

[Title omitted]

Verdict and judgment for plaintiff in above stated case at January, 1934, Term of Superior Court of Haralson County, on January 16th, 1934, for $5,000.00.

The defendant in the above stated case being dissatisfied with the verdict and judgment in said case as aforesaid, comes during said term of Court and before the adjournment thereof, and within thirty days from the date of said trial and the verdict and judgment therein, and moves the Court for a new trial, upon the following grounds, to wit:

First. That the said verdict is contrary to law and the principles of equity and justice.

Second. That the said verdict is contrary to the evidence in said case and without evidence to support it.

Third. That the said verdict is decidedly and strongly against the weight of the evidence.

Whereupon, movant prays that these grounds for new trial be inquired of by the Court, and that a new trial be granted movant in said case.

Walter Matthews, E. S. Griffith, Maddox, Matthews & Owens, Attorneys for Movant.

Read and considered and ordered filed. It is ordered that the plaintiff in said case show cause before me at the Court House in Buchanan, Georgia, at such time as motions are heard for this term of court, — M., on the — day of ——, 1934, why the foregoing motion should not be sustained and a new trial granted in said case.

[fol. 51] It appearing that it is impossible to make out and complete a brief of the evidence in said case within the time usually allowed by law, it is ordered that Movant have until the final hearing of said motion, whenever that may be, to prepare and present for approval a brief of the evidence in said case, and the Judge may enter his approval thereon and the same may be filed in the Clerk's office, either in term time or vacation, at any time up to the date of the final hearing of said motion for new trial, or within ten days thereafter. If, for any reason, said motion is not heard and determined at the time and place above fixed, it is ordered that the same shall be heard and determined at such time and place, in term time or vacation, as counsel may agree upon, and upon failure to agree, then at such time and place as the presiding Judge may fix on the application of either party, of which time and place the opposite party shall have at least five days notice in

writing. If, for any reason, this motion is not heard and determined before the beginning of the next term of said Court, then the same shall stand on the docket until heard and determined at said term or thereafter.

It is further ordered that the Plaintiff be served with a copy of this motion and order, unless service be acknowledged; and that this order act as a supersedeas until the further order of this Court.

This the 22 day of January, 1934.

J. R. Hutcheson, Judge of Superior Court of Haralson County.

[fol. 52] Due and legal service of the within motion and order acknowledged, time, copy, and all other further service waived.

This the 22nd day of January, 1934.

Arnold, Gambrell & Arnold, Price Edwards, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 53] In Superior Court of Haralson County

Brief of the Evidence—Filed April 5, 1934

Edgar Orr, called as a witness in behalf of the plaintiff, first being duly sworn, testified as follows:

Direct examination:

My name is Edward H. Orr. I live in Atlanta. I am a commercial photographer, and have been in that business 13 years. On the 14th day of April, 1933, I took some pictures of the Southern Railway track in this county near Bremen, to the west of Bremen. I recall a colored church about a mile and a third west of Bremen. I recall photographing a number of ties. I am referred to picture No. 1, taken at a point ten rails west of a point which was pointed out to me, a point was pointed out to me opposite that colored church and graveyard as being the point where this train No. 40 was first derailed. That picture No. 1, with reference to that point where the train was first derailed, opposite that negro church down there, was taken a

short distance west of the point of derailment. The rails were counted at the time. This memorandum is correct; it was ten rail lengths west of the point of derailment, toward—— That first, No. 1 was looking east on the track, and was a correct photograph of the track as it appeared. Picture No. 2 takes in the church; this picture includes the church. It was taken about 14 rail lengths west of the point pointed out to me as the point of derailment. When I was there a gentleman by the name of Mr. Lunsford was there, a son-in-law of the deceased engineer, Mr. Cox. He pointed out the point of derailment. This No. 3 is another photograph I took in that vicinity. No. 2 is a correct photograph. Picture No. 3 was taken about 15 feet west of the point of derailment, looking toward the point of derailment, and is a correct representation of the track. Picture No. 4 was taken from the point of derailment of the engine, looking [fol. 54] toward the rail and ties. Mr. Lunsford was seen in No. 3; he is not in this one. All the pictures are correct representations of the track. Picture No. 5 was taken from a point about 20 feet east of the point of derailment, looking west; that looks west, toward Birmingham, and was taken on the Bremen side of it. That gentleman is pointing at a depression—a mark on the tie, apparently made by the flange of a wheel. In No. 3 he was pointing at the point of derailment, showing the point of derailment. No. 5 is a correct representation. No. 6 was taken from a point about 30 feet east of the point of derailment, looking east, toward Bremen. It shows the curve of the track toward Bremen. It is a correct representation. In picture No. 7 I moved up about seven-tenths of a mile to where there was a switch to the right; this picture was made at a point near the Bremen station, about 30 feet west of the right switch. That's close to three-quarters of a mile from where I took the first picture. No. 7 is a correct representation. Picture No. 8 was taken from a point about 30 feet west of the right switch and about ten feet south of the south rail, looking north. It is a correct representation. No. 9 is taken from the same place as No. 8, anl looking north from the south of the track, looking north; it shows the condition of the rails and the spikes as appeared at that time. It is a correct representation. Last week I went to the Southern Railway Company's roundhouse in Atlanta and took a picture on the front of some engines of a contrivance known as Wright's

Little Watchman. I took those pictures on Tuesday, January 9th. I went to the roundhouse at North Avenue, and the foreman allowed me to take these pictures. No. 1 is a close-up view of this contrivance, including the part that is on the engine truck and including the part that is attached to the frame of the engine; that is a view of the Little Watchman device, and is a correct picture. Picture No. 2 [fol. 55] is a correct picture of the front of the engine from a similar viewpoint. No. 1407 is the number of the engine in question. The first one is of the same engine. Picture No. 3 is taken from the left side of one of those green engines, No. 1407, the same one. It is a correct picture of the front of the engine showing the apparatus shown in previous pictures, all of the same engine. No. 4 here is a correct picture of the front part of engine No. 1263, all of the Southern Railway, showing the Little Watchman and attachments.

Cross-examination:

These photographs of the condition at Bremen were taken on April 10th. I went there at the instance of Mr. Arnold, at his request. My place of business is in Atlanta. This photograph No. 9 is taken up east of the right hand switch and near the station at Bremen, just slightly east of the right-hand switch, and something like three-quarters of a mile from the point of the original derailment as I understood it, or from the little church. I of course don't know where it derailed myself, and don't know the details of the accident. All I know in regard to those things is what somebody told me.

Redirect examination:

In No. 8 I was standing south of the track. The station of Bremen is to the right. This last picture, No. 9, was taken from substantially the same place, slightly south of the track. We made a memorandum at the time of the exact position of each one. This is the memorandum I made at the time. There is some doubt as to whether picture No. 9 was slightly east or slightly west of the location of No. 8. It was near the same point.

[fol. 56] W. A. GOREE, called as a witness in behalf of the plaintiff, first being duly sworn, testified by deposition as follows:

Direct examination:

I live at 3710 Avenue D, South, in Birmingham. On the 14th day of February, 1933, I was in the employment of the Southern Railway Company. I was both an engineer and fireman. On the 14th day of February, 1933, I went out of Birmingham towards Atlanta on train No. 40, which was a passenger train, and I was firing that engine. Mr. J. M. Cox was the engineer of that engine. I think we had seven coaches, either seven or eight. I am acquainted with a darky church just before you get into Bremen, I know where it is. I have passed by it often. There is a curve in the track as you approach that church, a curve for about a quarter of a mile. I don't remember the place where this front truck first got off the track. If it was just about in front of that church, I know where that is. As I approached that church there was a long curve to the left, that went around that way. As to what I was doing as I approached that church, I will give the whole details: As we topped the hill from Waco, I went back to clean up the tank and get ready to pull out a slide to the stoker when we got to Bremen. That engine had a stoker; you didn't have to shovel the coal in with your hands, but opened a valve, and that operated automatically to put the coal in the engine just as I wanted it. I went back to sort of clean up my stoker so I could operate it; if coal gets in the little groove, you have to sweep it out, and get it so it will pull out the groove; the slide fits in like that. Before that I had been sitting on my seat there. I always look forward. I did not see anything on the track, any rocks or anything of that sort, or any objects at all that attracted my attention, on the track. The track comes up from Waco—let me draw you a diagram of it—coming from Waco and approaching that church [fol. 57] and where I understand it was derailed; that is where the curve is; this is Waco; this would be the switch at the bridge; of course it ought to be right here to be there by the bridge; then we come around. There is the negro church right around there. We have got a signal coming east right here, then we have got one coming west

right here, just as we top the hill; we came on up; this is a little bit too abrupt, it ought not to be quite that much, it ought to be like that, as we came on up about along here. When we topped the hill is where I went back to clean up the tank. On this drawing marked Exhibit 11, about the time I got to where that cross mark is on this rough drawing here, I went back to the tank. As I was passing this colored church here, I did not notice anything. I was on the tank. After I got past that church I did not hear any noise or anything of that sort; I didn't notice it, the engine was running. The engine appeared to be running just as it ordinarily did. I am shown a sort of detailed drawing, marked No. 10, with a place here marked "Church," and so on, and up here is a track that goes out to the left, and a little further on going east is another track that turns out to the left, and a little further on is a track that turns out to the right. As I got to this first track that turns out to the left I noticed a noise. It sounded as though we had run over something; it was bad; I thought we were derailed. The engine went on; just as soon as we crossed that switch, it straightened up, and I didn't hear anything. I didn't know whether it was all right or not; I didn't hear anything any more. I heard a noise when I was on the switch, and when I passed over the switch the noise stopped, and the engine continued to run along on the track like it was all right. I think it is about twelve car lengths from that first switch to the left to that second switch. When I passed that first switch to the left I was doing my usual work, firing; using the valve. [fol. 58] I sat up on my seat and was looking ahead. I didn't know we were off the track. The engineer was sitting on his seat box. It isn't essential that you hold the throttle all the time, they are held by notches; but he was at his regular place. After we passed that first switch to the left, about twelve car lengths, there is another switch to the left. I heard a noise when I struck that next switch to the left. It might have sounded greater than the first noise I heard because we were right on the other one no quicker than we got off of that one. When I got to the second switch to the left, I heard another noise. It wasn't over two or three seconds after that before we began to get derailed. The next switch was two car lengths, and when we struck that one to the right, two car lengths away, we just took down the passing track; the engine

got off the rails. I saw that. Mr. Payne says it run off the rails 184 feet, as well as I remember, when he came there. It was bumping along there 184 feet, and then it turned over on its right side. I couldn't say exactly whether the engineer put on his brakes right about the time that second noise was heard or not; he put them on right at the time, either before or when we headed in, that is as soon as we struck the third one. As soon as we struck the third one, I know he put them on; I just merely heard him; you know you can hear the exhaust from the brake. Speaking of that first noise I heard twelve car lengths back there at the first switch to the left, the engine doesn't often make noises going up places on the track like a chain rattling or something, not so much. Of course, there is the usual noise of the engine running. you know, but when you run over anything there is a different noise to what there is when the engine is just working on smooth rails. That first noise sounded like we had run over something, but she kept on going on the track, and I thought it was all right; I didn't know; I didn't have time; but that was [fol. 59] twelve car lengths away then I am speaking of. That twelve car lengths it ran all right apparently to me; wait a minute, anytime, all along when you are running at a high rate, you are running over a little trash or maybe just a little dirt, or this, that and the other that some truck maybe put on the track, and it creates a noise under the wheels, especially when you go fast, but if you don't go so fast you don't hear it. When you are going fast you often hear a noise from some little dirt or cinders or something on the track; and the train, however, goes on, if it isn't enough to lift it off by the flange. This train went on twelve car lengths after that first noise. I couldn't tell it was off the track. I didn't know it was off the track. When it struck that third one to the left, that made a big noise, and before I had any time hardly to think, it struck the one to the right. I didn't have time to do anything between that second noise and hitting the right-hand switch but hold, that is all, because in a second or two it was against that switch on the right; and then it got on the cross-ties and began to bump. I would say this gentleman was running this engine at least 40 or 45 miles an hour. That was the usual speed for that type of engine along there. I don't think there is anything unusual about that speed. I am both an engineer and a fireman. From the

time I passed that little negro church, if I had wanted to stop that train at that speed, I couldn't be exact, I could have stopped it within fifteen car lengths easy. The length of a car is 40 feet; I could have stopped it within fifteen car lengths, a car being 40 feet long, you could have easily enough stopped it in that time if you went in emergency. If you are approaching something bac, you know you must put it in emergency. In making a service application, you just have, in order to handle your train smoothly, you have to just be governed in the distance in which you have got to stop; but in saying I could stop in fifteen car lengths [fol. 60] of 40 feet to the car I meant an emergency application. I have stopped that train. I don't know just how far it is from that church down there to that final right hand switch—I never did measure it; we only know where the mile posts are and the switches; I never have been over there at all since then. Sometimes we run over dirt or sand or something that bumps and makes a noise; sometimes we have high water that just floats a little trash on the track, but ninety-nine times out of a hundred nothing happens on those occasions. I didn't know the front trucks were off of that engine from the time I passed the church. I don't remember hearing any noise that indicated the front trucks were off; I didn't hear a thing until we crossed that first switch to the left. We were going slightly upgrade. The gentleman was working steam. That exhaust makes a considerable noise. That would enable me to have stopped a little easier if I had applied the brakes going upgrade. After we hit this second switch to the left, I didn't have any time to react before hitting the right switch; it was too quick. That engine, when it left the rails, as to how it behaved, if you have ever ridden in a wagon over cotton rows where the mules were running, it was just about like it; we were dragging up the rails and cross-ties and everything, so you can just imagine how bad it was. I thought that that engine was equipped with Wright's Little Watchman. I couldn't say that I had examined that one, I have examined some. It wasn't my duty to examine it; but I thought this engine was equipped with it. I have been on an engine where that Little Watchman worked when the engine got off. That was turning in on Y's, and places like that where the curves are pretty stiff. When it works it opens the air to the atmosphere just like—opens the valve, putting the brakes in emergency

just like putting them on from the engine. I never was in a wreck before; not nothing but just getting off around [fol. 61] the switches, that is all; I have never had one to jump the track with me. When this engine got off the track and turned over, it broke all this pipe, and the steam just poured right back in on us. Mr. Cox got burned bad. It killed him. He was burned and scalded to death. Where this first switch turned to the left there is a road crossing there just west of that place; it is about twelve car lengths I guess from that switch. That road crossing is a place where dirt and so on is likely to get on the track from wagons coming across. That would make a noise; we have that frequently on crossings. A few times in my running I have seen that Little Watchman apply on the line of road. As to what would happen to make it apply, some unusual curve, you know, or maybe a swing of the engine that would be too great for it, and it would apply that way; it would put the brakes on immediately after the swing of the engine occurred. I don't know as I have ever had it to happen over two or three times. I was hurt so bad I couldn't look at the engine after the wreck. I was not unconscious. I have never been back there and seen that place where the trucks first got off, and seen the marks of it. I did not see any rock on the rail there, or anything. I have run over small rocks on the rails, cinders, or sand or sand rocks. I don't know as I have ever run over any sandstone rock as big as your fist. I have run over one as big as a hen's egg when we were working local. The engine crushes the rock. I don't think I have ever known of a rock throwing the engine off before in my experience. I couldn't estimate how many times I have ever run over stones or rocks or sandstone; I guess hundreds of times, because I have been here twenty-six years. When we want to stop an engine, we have a sand box on our engine. You apply sand if you want to; it isn't essential, but you can do it. That does not make the engine run off the track; it tends to stop it because of the friction. The difference be-[fol. 62] tween sand and sandstone rock is that this sand would be distributed along on the rail, and the sandstone rock would be in one pile. If I were running an engine along, and saw a small rock on the track, I would not stop for it. The engine usually crushes it, or just brushes it

off, and sometimes you don't ever know it. If a rock was a foot high the pilot would knock it off. I have heard of children putting things on the rail, kind of along on the track. I couldn't say that I have ever seen it or run over things they put on, unless it was around stations, as then we are never running fast in places like that where we work local. I have never had a rock to derail a train I was on. I didn't have to shovel coal into this engine at all; all I had to do was to turn a valve, and I could sit on my fireman's seat and look ahead and do that, just like the engineer was looking ahead when he ran the engine. I couldn't give no exact estimate on how much that engine weighed; we only have the time card weights, that gives something over 400,000 pounds; you could put the same thing down there that Mr. Goff gave—he knows more about it. I couldn't say what size rail that was, how many inches high it was; I think it is a one hundred pound rail all right, but I couldn't say anything about the weight. I think they are elevated on the outside, higher on the outside than on the inside. Just before you get to that negro church it is almost level. On a curve it is elevated, but what I had reference to, just a little further back you will find on a curve will be level; it will be on a grade but the track will be level this way, one rail will be the same height as another, but when we reach a curve the curvature goes to the outside. I don't know what the correct elevation on the curve is. I don't know what the height of those rails was, I couldn't say. I do not know what degree curve it was. I have been working for the road since 1907. I guess they have had these watchmen on these engines at [fol. 63] least five or six years.

Cross-examination:

I have been running over this particular line of track between Birmingham and Atlanta since January, 1907; and I have run as both engineer and fireman since 1912. I was promoted to engineer in June, 1912; but since the period of depression, certain engineers have been set back to firing. I had a fireman's job at the time of this wreck, and had had for some time prior. I had been running with Mr. Cox as engineer since September of 1932. As to how often Mr. Cox made the trip between Birmingham and Atlanta, going from Birmingham towards Atlanta in the same direction

we were going on the date of this accident, we made twenty-six trips in twenty-four days and then we were through for the rest of the month. We did that each month, we finished up our work on the night of the 24th, and we were through until the first of the next month. We did not make a round trip each day, not exactly; not twenty-six round trips, thirteen round trips. We figured we made our regular turn every time we caught the turn ahead of us, when we came in here on No. 11, we would go out, 11's crew goes out on 40, and we go out on 12, don't you see; but we didn't go on this particular train every day. Mr. Cox and I went on this particular train three times a month. I don't know how long prior to this accident was the last time Mr. Cox and I had made the trip from Birmingham to Atlanta on this particular train; it was just about fifteen hours; we had been in about fifteen or sixteen hours. The last trip I had made on 40 prior to the day of the accident was about eight days before that. On all of my trips between Birmingham and Atlanta I went over this particular piece of track where this accident occurred. I have known of a derailment at that place. H. F. Waters turned over right at that signal [fol. 64] there in about 1921, I believe, about twelve years ago; very close to this same place. He had that Birmingham Special. On this particular day that this accident occurred, we left Birmingham at seven o'clock, and we were due at Bremen, I think it was 10:10. On that morning we got about eight or nine minutes delay at Edwardsville, Alabama. That is eighteen miles west of Bremen. I did not have occasion to observe the time immediately before this accident, nothing other than just through force of habit; you just look at your watch every so often. I looked at my watch there just as we were rounding that curve, as soon as I got on that curve; I say, as well as I remember, it was 10:13, and I just figured that we would be about four minutes late or five down there at Bremen; so that, in that eighteen miles between Edwardsville and Bremen, we had made up some five or six minutes. We were not running so much faster than the schedule time, just a little bit. When we passed this colored church up there I was back in the tank. You know, the tank is just like knocking the end of a box car out, then the ends of the car; I was standing right where you would knock the end of a box car out, just standing on the edge of the tank off of the apron. Standing at

that place, I couldn't see the track ahead of me at all; and standing at that place it was very difficult for me to hear any noises that might have occurred from the running of the engine. What I was doing there at that time was necessary in the operation of that engine; to keep that funnel clear so that the coal would flow in freely. The engine was steaming at the time. It was just after I had passed where that church was that I came out of the tank and got on my seat box; just before we rounded the curve to come up to where the first switch was, but it was after we had passed the colored church. As to whether the engine had run over anything up to that time, I couldn't tell. I was not in a [fol. 65] position to tell, and I couldn't have heard it. If it struck a rock back there and was derailed, I was not in such a position that I could have heard it or felt it, because I was on a different part of the engine, different equipment from the engine. As to whether or not a rock would derail an engine, it looks as though it would depend on the size of the rock and the track conditions. It was a sort of reverse curve there. That didn't give the engine so much of a rocking, swaying motion; those engines hold curves mighty good; but it gave it some vibration or rocking motion, all engines have that when they are coming up like that; and when it has that rocking motion, as it comes over on the left side, the weight is largely on that side, and on the right side the weight is relieved a little bit, and vice versa as it rocks. The first thing that I heard was when we struck the first switch going to the left after passing the church. I heard an unusual noise then. I looked at Mr. Cox when I heard that noise, and he looked at me. I turned my head to look at him, and he turned his head to look at me. He did not put on the brakes at that time. I didn't know what had happened at that time; I thought something was loose under the engine, but I didn't know whether it was on the ground or not; it didn't feel like it was on the ground. Sometimes there is some of those hangers will fall, one side works loose, and maybe one side of it be run over, and it would make the same noise, but not as bad as that, I didn't think it would. It was a different noise from running over a little trash or gravel or something, it was bad all right; and when we struck the next switch that we reached I heard the same noise again; and then when we struck the third switch, that was when it was derailed to the right. I think

Mr. Cox put on the brakes when we struck the third one, just right at the time; maybe just as soon as we were on the second one he may have, it was so quick running at our [fol. 66] speed you couldn't even start to say anything in two car lengths running that speed. It was so quick I don't remember whether he applied the brakes after the drivers got down on the ties or before, I couldn't say about that. I couldn't say that I saw him apply the brakes; I just heard the exhaust like from the brake valve, that is all. That exhaust could not have been the application of the brakes from this Little Watchman; I don't know as it would have been exactly the same noise, I don't think it would be quite that way. When he put on the application, if he put it on, or if the Little Watchman put it on, I couldn't say whether it would all be the same or not; I have never noticed the sound as to whether it would do that or not. I couldn't say that it is entirely possible that the noise I heard that I thought was his application of the brakes might have been the application of the Little Watchman; I couldn't say about that. I think Mr. Cox had good hearing; he appeared that way. After I got on my seat box, relatively Mr. Cox and I were in approximately the same position on the engine; and he had the same opportunities to hear these noises that I had.

Redirect examination:

I was back on the bank just before we approached that church. I got back on the seat before we reached that first switch to the left. The engine appeared to be running all right then, so far as I knew, before I heard that first noise. There was nothing to call my attention to anything wrong until I heard that first noise; I hadn't detected anything wrong myself; and I was up there sitting on my seat, looking ahead. It wasn't but a few car lengths before we had struck the first one; but whatever distance it was I was sitting there a few car lengths before we struck that first switch to the left, and it seemed to be running all right to me. We struck that first switch to the left, and heard a noise; and I looked at the engineer and he looked at me. [fol. 67] The engine continued to go along on the track; it straightened up like and we thought it was all right. What I mean, I didn't know whether there was anything wrong or not; sometimes, you know, as I say, we will run up on

trash on the rail, or on a crossing a little dirt that a wagon will leave there, and that will make that noise. The engine continued along the main line, and it ran on all right. When we struck the second switch to the left I heard a big noise; I knew something was wrong then; and, as quick as that, I heard the exhaust. You see, it is an exhaust; it comes out from the brake valve, that is where you hear it at. When the engineer applies the gauge, that is when I hear that noise. I have heard that noise before. I knew that was the engineer putting the air on, I thought that was what it was; I cannot imagine anything else that it was; but by that time the engine was pretty well off the track. When the brake was put on by the engineer the front of it was already off the track. In running a schedule to arrive in Atlanta on time, it is usual for us to have fluctuations in the speed; when we get a little behind time and run to make it up, that is all right; all of them do that. This speed of 40 to 45 miles an hour wasn't in excess of the rules; we were allowed to run that fast.

D. A. LUNSFORD, called as a witness in behalf of the plaintiff, first being duly sworn, testified as follows:

Direct examination:

I am a son-in-law of the dead engineer, James M. Cox. The date of his death was February 14th. I am the husband of this young lady here, his daughter. I first heard of the wreck there near Bremen, in which he was killed, something after 10 o'clock that morning, February 14th, and shortly after that I went up there and examined the [fol. 68] place where it first got off the track and where it finally ran off; we went up there Sunday after it happened on Tuesday. It happened on Tuesday, the 14th, and my wife and I went up there the following Sunday. I went down to the colored church and graveyard there opposite this place where it was said to have first got off the track. I saw a mark where it got off down there, I think it was, I am sure it was, where the wheels hit the crossties. There was little dots there, you couldn't tell what it was, a little smudge on the rail before it looked like it finally got off. I don't know how far that mark extended that looked like

perhaps the flange was running on the rail, before it finally got off, about three feet, something like that. I walked 50 or 75 feet I reckon down the railroad, on further. I also went up to the point where the engine finally turned over, at the first right hand switch and before I got to the right hand switch, I went there first and walked back up the track. I didn't walk all the way that day, I did later on. That day, Sunday, I went down there and saw the place in front of the colored church; and I also saw the place near the right switch. On the 10th of April, 1933, some 50 days later, something less than two months later, I went out there again with Mr. Orr, the photographer who has been on the stand here, and he took a number of photographs, that was the day I walked all the way from the church. The track and the ties and all were in substantially the same condition when Orr took the photographs that they were in when I went there Sunday. I went there later on June 1, 1933, with your son, Mr. Tom Arnold, and took some small photographs again. I took my kodak and took one. This picture No. 1 was made toward Birmingham from where the derailment took place; we taken it ten rail lengths west of —. The length of a rail is about 39 feet I think, I am not positive about that. We took ten rail lenghts, looking [fol. 69] toward the scene. That is a correct view of it, and that's the way it was when I first went there. The next one was taken a little further toward Birmingham, you can tell that by the picture. This was 14 rail lengths west of the initial derailment, the mark that I took to be the original derailment. No. 3 has me with a handkerchief wrapped around my hand at a point on the rail; the point on the rail that my hand points to was about 15 feet west of the point of derailment. This one (indicating) shows the point of derailment. He photographed me in No. 3 right where the first derailment occurred. Picture No. 4 is a close-up of the ties at the point of derailment. Looks like the two ties in there are mighty close to the point of derailment, I remember it was taken pretty close to it; this memorandum says three or four ties west of the first wheel mark. I remember it was real close to it. It was west of it. Those two ties that are shown in that picture, the first one from the left side and the second one, were in that same condition when I went there Sunday after this wreck on Tuesday. Those two ties looked like they were pretty badly obliterated and

rotten, bursted and marked with the wheel. The left-hand tie looks like the spike came right in that split in the tie. The wood of the tie is missing from under the spikes; there is not but one spike in it and it is missing from that; I mean the plates—it is missing from the whole on the other side. The rails rest on the plates. There is one spike on the outside in those plates. There is a hole from another spike there; there was one spike missing from every plate. In this picture No. 4, the right-hand ties, there is one spike on the left to the place that joins that tie. As to there being any wood for it to catch in, the spike might catch, but very little, down at the sharp point. That's the way it was at that time. Picture No. 5 shows me pointing at something there on the cross-tie; I am pointing at a cut [fol. 70] on that cross-tie. That is about 20 feet east from the place where I saw the first initial derailment. That mark on the tie looks just like where a wheel ran over it. I saw marks continuing along on those ties. I saw some ties with two marks on them, one on the inside from the left wheel and one on the outside from the right wheel. I saw marks of both wheels on the same tie. There were three ties having very plain marks on them that I am pointing to there in No. 5. Picture No. 6 shows the general sweep of the track on the curve and the reverse curve in it there, I recall that scene. I think that is a correct picture. It shows the first curve after the derailment looking from near the scene of the first derailment, the first curve after the first derailment. Picture No. 7 is about 30 feet west from the right-hand switch three-quarters of a mile away from where the first derailment of the trucks occurred. Where I am there is 30 feet west of that first right-hand switch. Those things I am pointing out there on the ties are the marks made by the flange of those front trucks. There are also marks on both the same ties on the outside of the right-hand rail going toward Bremen. Picture No. 8 represents the ties; it shows the condition of the cross-ties. With reference to that final right-hand switch, that picture was taken about 30 feet west of it, practically the same spot as No. 7, but a different direction. The condition of that first tie to the left is bursted. That was in April, 1933. The picture shows the condition of that tie on the right. Skipping one tie and then going to the tie next to the little box under the track with the wire running into

it, that is the condition that tie was in in April. The condition of the other tie next to the box there that the wire runs into, that is the way it was in April. A train came over that last place where I have shown these ties and this box in Picture No. 8 about the time that photograph was being taken. I saw the train come over that point in the track, [fol. 71] and as the wheels went over it the track would sag I would say between two and three inches as every truck went over it; and when the wheel would get off of it it would go back up. Picture No. 9 was taken a little further west than Picture No. 8, a little beyond the left switch. It was toward Birmingham—I mean toward the last switch, toward the east, further east than picture No. 7. It was not taken after I passed the last switch; it was taken on the other side of that, toward Birmingham. That is a correct picture. On June 1, 1933, I went down there again and looked at the track, and some photographs were taken by Mr. Tom Arnold. These pictures are numbered 10, 11 and 12. No. 10 shows the marks of the flange of the wheel on the cross-ties on each side. Beginning at a point near the colored church where the trucks first got off, the marks of the flange shows on the same tie on both sides of the rail, on both the inside of the north or left rail, and the outside of the south or right-hand rail. I have a memorandum in my pocket for something like 40 or 50 feet where I counted the ties where the wheel flanges marked both of them. Pictures 10, 11 and 12 are correct; they have got me in them; I know they are.

Q. Now I wish you would take any memorandum you made, if it refreshes your memory, and let's begin now; here's where that front truck wheel first ran off the track. We are going toward Bremen. Here are the two rails. Tell me by the rails, in the first 40 or 50 or 60 feet, where you see the mark of the wheel on the inside of the left rail, and another mark corresponding to the other wheel on the same axle on the outside of the right rail.

A. The first three—the first three rails after the derailment. Here's the mark where there was the derailment; [fol. 72] the first three were marked on the left-hand side. After the mark showed the wheel got off, the first three ties had a mark on the left side, inside the left rail. The next three, No. 4, 5 and 6, didn't have any mark that you could be sure there was a mark; it looked like it didn't hit

them; I couldn't be sure about that. No. 7 had a mark on the left side, which was on the inside of the rail. No. 8 had a slight mark on the right-hand side. It didn't have one on the left side, and a slight one on the right side. Now take the 9th tie, there was a light mark of the flange on the inside of the left rail, and a heavy one on the right, on the outside on the same tie. Both wheels of that axle made a mark on the same tie. No. 10, I couldn't tell any on the left side, but there was one on the right side. No. 11 was marked slightly on the left-hand side and heavy again on the right. 12 through 18, seven ties—that is, 12, 13, 14, 15, 16, 17 and 18—were hit on both sides, every one of them, by the same wheel that got off there; hit both sides, one wheel on the inside and one on the outside. The marks on the outside were directly opposite the marks on the inside. No. 19 was hit on the left side and had a light mark on the right side. No. 20 and 21 was marked about the same on both sides. That's as far as I have got a diagram. I walked all the way up there; and off and on all the way up there I often noticed some tie was hit with the same wheel, sometimes one would be marked, and again you would see where it was marked on both sides. The condition of the spikes on the right hand side going toward Bremen at the point shown in picture No. 9 is that they wasn't down; you could lay your two fingers up under the head of the spike, between the spike and the rail. That is the one I am pointing at; that's the one I put my two fingers under, and is on the outside of the right-hand rail going toward Bremen. That was in April, 1933.

Cross-examination:

This reference to the spikes being loose is on picture No. [fol. 73] 9; and the picture that I have there and that I refer to where those spikes seem to be up are not on the right hand sidetrack. I don't know that that's where the derailment occurred; the sidetrack is down further; that was just before the derailment occurred, just before you got to the derailment. I don't know that right here (indicating) is where that sidetrack takes off, it is not. There is a left switch that takes off up there somewhere. That is on the main line. There is only one right-hand switch. There are three sets of rails shown in that picture; you can see three whole sets, except down here further; that's the left-

hand switch. The right-hand switch is down here further, it is not in the picture; one of these other tracks might run out, I don't know. I said something about tie plates, two holes in the tie plates; I don't know what those are for. I have never had any railroad experience, and don't know a thing in the world about railroad construction. I have an idea what those are put there for, but I don't know; I wouldn't say I knew. They were all along the track as far as I went. On the outside of the rail there was only one spike in the tie plate. As to ever seeing a place on the railroad that that was not true, just one spike on the outside, I never paid any attention to it; I never looked at it anywhere else; everywhere I saw it over there that was true. From where the wreck occurred that was brand-new track; I never paid any attention to it. That was where the wreck occurred. I am talking about at the church, I went down there. The wreck didn't turn over there. There was no track torn up there; no new track there; no new construction of any kind there. Therefore, from the point where I went, up west of the final point of derailment, beyond that church, I saw just one spike in those tie plates on the outside; and on the curve there was two on the inside; and those two on the inside were right there at that [fol. 74] point. As shown on this picture No. 4 there are two on the inside, and two on the inside of this rail (indicating). As shown in picture No. 4 those two ties are right close to the initial derailment; I don't know how far, three or four or five feet west; it was toward Bremen; no, I am mistaken, this was toward Birmingham from the initial point of derailment, just before the wreck occurred, three or four feet. I know where I was shown the initial point of derailment was. I don't know except the marks there and where the officials of the Southern Railway put some brush. I saw the brush. I saw it in the paper that they did and I heard that they did, and I saw the mark on the rail. I saw it on the rail, and first derailment. I saw it in the paper and I saw where the rail was marked. I don't know what sort of mark was on it, a kind of a smudge-looking mark, where it was sliding off. What I mean by smudge is where you could tell where the rail was kind of cut or marked by the wheel, looked like. I have never seen a wheel make a mark like that, I never paid any attention to any marks made on rails before. I didn't see it

make that mark, so I couldn't swear that it did. I have never had any experience in keeping up track, nor have I have had any experience in determining what was a good sound tie that would hold a spike. I don't know as I have ever watched at any other point where a train would go over a tie, a place like that, particularly. I don't know that when the weight of an engine goes on to any part of a railroad that there is more or less give to that track; therefore when I saw it give at that point near the right-hand switch, so far as I know that may have been the normal thing that happens every time a train gets on a piece of track. It might happen at every other place. I live at East Point. I am engaged in office work, working for the C. W. A., in the office of the C. W. A. I have been working for them about three weeks or four weeks. Prior to that time I worked at the Georgia Cotton Growers Asso-[fol. 75] ciation office. When working for the Georgia Cotton Growers Company I received $140.00 a month. I am receiving $18.00 a week now. My wife has always eaten. I have bought some things and my father-in-law has bought some things. He give us the rent of the house; after his wife died we moved out there and he give us the rent of the house, and he paid for my wife a maid; we had a maid one or two days before the accident, and when we moved out there he told her he would pay the maid $20 a month—but he never had done it, he never had hired any other maid; I mean just before my mother-in-law died. I was just occupying his house; my wife and I; and kept house there and he lived with us when he was in.

Redirect examination:

Somebody else helped me take care of my wife and that was my father-in-law. My father-in-law's wife, Mrs. Cox, died October 30, 1931. Mr. Cox owned a house in East Point. He gave his daughter the rent of that house. I would say that rent was worth $35 or $40 a month; that is the prevailing rate of rents in that section; it was the best house on that street. I wouldn't say that the old man cost my wife anything at all. Most of his nights were spent in Birmingham. His runs required him to spend them there. A room at my house was not kept for him; occasionally my mother spent the night with us and—I don't see where it cost my wife anything to keep that room for him. He gave

her the rent of the house. As to what else he contributed for her comfort and support of the way of employing a servant, he hired a maid, paying her $20 a month, and when we moved out there there was about eight tons of coal in the basement and he gave her that, and the following winter he bought her a gas heater, and he gave her a Ford automobile; that was before his wife died, Christmas of 1930. He gave $450 for the Ford, if I ain't mistaken. That was [fol. 76] his house; he had occupied it and turned it over to my wife for occupancy. He gave her a nice dining-room suit and a bridge lamp and a table lamp. I don't know what the dining-room furniture cost. He gave that to her in February before he was killed—February, 1932, I think; I am not sure about those dates. The old gentleman, when he was in Atlanta, made his home in that house. He idolized our child; he would give him a dollar every birthday and he was always giving him pennies and chewing gum. He was one of the family when he was in the city. For the last year I don't believe he would average over one night a week in Atlanta. He was 59 I understood. These yearly statements stamped with the stamp of the Southern Railway for income tax return purposes were gotten from the old gentleman's effects. In a general way he made something over $300.00 a month.

Recross examination:

When Mr. Cox's wife died he was not in town enough to keep house for. We didn't go out there to keep house for him; we went out there to save money. He would come in sometimes 11 or 12 o'clock and leave at five or six, in a few hours—I wouldn't call that a whole night; we wouldn't see him when he would come in at all. As to whether he made his run from Atlanta to Birmingham one day and came back from Birmingham to Atlanta the next day, I wouldn't say that he did every day. I imagine the day that he was off he was in Atlanta; sometimes he spent the extra days in Birmingham. I remember when he stayed there and had some dental work done. The three or four days he was not running he would always go to his brother's or sister's or something. He was always in Atlanta when his run come in, I am not familiar with that; I didn't keep up with that, it was none of my business.

[fol. 77] R. L. HOLCOMBE, called as a witness in behalf of the plaintiff, first being duly sworn, testified as follows:

Direct examination:

At the request of Judge Edwards and you I went down the Southern Railway track near Bremen and looked at the track at certain places. Judge Edwards and you and your son went with me. On the day this wreck occurred, February 14, 1933, I heard of this wreck. I was an officer of the law in this county at that time. I held the office of Deputy Sheriff. I hold the same office now. I went down there to that place and looked at that scene opposite that darky church and graveyard down there. There was just a little pile of sand rock, crushed on the rail, practically in front of the church, where the train derailed. I don't think I noticed any on the track. That little crushed sand was just possibly off the flange of the rail; no great sight, a small amount, I think there wasn't much more than two handfuls, I don't think there was. This (indicating) is similar to it. That looks like sand down there in the bottom, it was something of that kind. That stuff was just off the bottom of the rail, the flange of the rail you might say. I noticed a mark on the face of the track, the right-hand track; I remember a mark on the rail, it finally dropped off onto the cross-tie. It was some distance as I remember to where both flanges seemed to hit, possibly they didn't at first. I show that memorandum there. I think that memorandum is correct, I have looked over it. We made that at the time. The left wheel alone hit the cross-ties after it derailed, the mark being shown on the left of the tie, inside the rail. The left wheel hit the first three ties, the mark being shown on the left side; then the next three ties bore no marks; then the seventh tie was hit on the left side alone; then the eighth tie had a slight mark on the right [fol. 78] side; then the ninth tie was hit lightly on the left and a heavy mark on the right; then the tenth tie was hit on the right side only; the eleventh tie was hit on the right side and slightly on the left; then six ties, from twelve to eighteen, were hit on both sides; the 19th tie was hit on both sides, but on the right side lightly; and the 20th and 21st ties were hit on both sides. We made that memorandum at the time. I did some measuring of the rails and things there and made a memorandum of it, Mr. Swint and myself.

The top of the rail at this point of initial derailment is six and three-quarter inches above the tie, our measurement. I measured it. I put a rule on it and saw that it was 6¾ inches above the tie. The mark of the flange of the wheel on the tie at the second left switch was 10¾ inches from the rail. That was measured. There is a dirt crossing near those two switches, and from that point down there where that church is to where it finally ran off is practically three-quarters of a mile, to where it finally wrecked. I saw the wreck of the engine up there. The cross-ties, as I remember, was practically rotten. They were partly rotten at the church and near this place. The top of the rail above the tie, counting the tie plate and everything, is 6¾ inches above the tie. Here is Bremen (indicating on diagram) up here, down here is that church, here is the mark of the first derailment down there by the church; looking at that curvature, and looking at that left switch going out and then the second switch to the left and then the right switch, that plat fairly represents the situation according to my recollection. At this second left switch here I noticed marks on the ties of these wheels. The mark on the left side from the rail was 10¾ inches. There is a crossing just about four rails west of the second left switch; there is a place there where there are some steel rails put across that crossing. The rail on the inside is broken, and on the same cross-
[fol. 79] ing and on the same cross-tie an outside rail is broken, each three or four inches from the rail; one is on the inside and the other is on the outside; they are broken. There were some spike heads marked as if they had been bruised and had come in contact with wheels or something; on many joints the spike heads are marked. The first mark of the wheel flange that I saw, inside the rail on the left, was 9½ inches from the rail. I found a small mark on one of the ties down there 18 inches on the inside of the rail; and on the outside of the same rail and mark of the wheel was 7½ inches on the outside. There were four ties right together all showing inside and outside marks there. I went out there with Judge Edwards and you on a day last week; and Mr. Cox, who sits over there with his wife on the first bench, came along while we was there. I am shown a picture here, looking across the track toward that house there, the little outhouse and all; I remember that view over there. I remember some new ties being placed there. That

picture was taken in April, 1933. I remember the place shown in that picture. A passenger train came by there when we were looking at that place. I got there and saw that engine. I think that picture represents it as it looked turned over on its side there, as good as I could get at it. We will mark that No. 13. This one marked No. 14 also represents the way that engine looked. I didn't see that after they stood it up; I saw it when it was lying down like 13 and 14 show it.

Cross-examination:

All these measurements and examination of ties and marks on the ties to which I have testified was made some time in December I think, before Christmas, approximately a month ago, that is my recollection; and I was there again last week; and some of the measurements I am now testifying to were made there with Mr. Arnold and Judge Edwards. Prior to that time I had made no measurements of any kind. The marks on the ties that I am testifying to [fol. 80], are marks that I saw there in December and last week, I saw those marks of the flanges—and they are still there; the same ties under the track, probably there may have been a few new ties added at different places; but if so it was just scattering, here and yonder, that is my recollection; seems like I remember five or six in one place, new ties, at some point or other; I don't remember for sure just where that was. It was probably where the train first derailed, I think; I am not sure about that; but the great bulk of the ties are the same ties and show the same marks that they did the day of the accident; that is my recollection. I went there as an officer with the sheriff and Mr. Swint, and at a point on the track immediately in front of that church, on the outer rail of a curve bending to the left, I found there evidences of a crushed rock. There were portions of that on either side of that outer rail. That was one of these hard, smooth sand rocks, what some of them call sand rock; such as you pick up around a stream that has been washing along; you usually find them there. I don't remember seeing there just a few feet from the track a place where a rock had been taken from out of the ground; I remember seeing some small tracks, seemed like boy tracks, just before I entered into the road, 15 feet from the railroad or something like that; I don't remember so

much about the rock hole. It left some ground-up dust that indicated not a very large rock, you might say an inch and a half thick or something like that and maybe two inches wide and three or four inches long in my judgment. I got down there in the afternoon I think, probably 1 o'clock. The wreck had occurred some time that morning, about 10:30 I think; and the place where this rock had been crushed, they had placed somebody at the place and brush or something over the footsteps around there, I remember that. It had been raining and there was some mud there, and I saw evidence of footprints leading to [fol. 81] the track and leading away from the track, and I saw some brush had been placed over that to prevent it being disturbed. Other people were walking around there, in two or three places at least, a couple of places or more. Up at that point of the initial derailment, immediately in front of the church, the track was in no way disturbed up there, out of place or anything of that sort. There was no ties knocked out of place. The only thing I noticed was the imprint of the wheel on the outside of the east rail, and on the inside of the west rail there was some imprint there on the ties. While I was there I don't think I saw any trains pass over that piece of track; I wasn't right at the place all the time, I was two or three different times, and off— During the afternoon I might have seen trains passing from Bremen toward Birmingham, but I don't remember about that; I didn't stay at the track long; I took a trip two or three miles out. I don't remember any trains coming from toward Birmingham to Bremen. Where the engine turned over was up at the right-hand switch. The track was torn up where the train was lying. There was probably some portions of the distance between where it first derailed and where it turned over that I didn't see that afternoon. This photograph No. 14 that I have just identified, that is taken from a point back toward Bremen looking east, and it doesn't show the condition of the track that the train had come over and the torn-up portion of the track. This picture No. 13, that is a picture of the engine. The rails underneath that engine were torn loose from the ties on the outside, and the ties all thrown in every direction. There were a number of of cars of the passenger train off the track, and they had

twisted and torn the track back there. I don't remember so much about back to the place of this iron rail crossing; I was not noticing it; I noticed it more back where [fol. 82] it first derailed and then back to the wreck. But I think the only place that the track was torn up was down on the right-hand switch and in that immediate vicinity some seven-tenths of a mile from the point where the trucks were initially derailed.

Redirect examination:

The engine when it was finally turned over, as shown in these two pictures, was 100 yards from the right-hand switch, or something like that, some distance. Of course, right where this engine was turned over the track was all torn up and for some distance back. I don't think it extended back west of that right-hand switch; my recollection is that it didn't.

Recross examination:

My recollection is it was not; the track was not torn up back some distance down to the first right switch.

Redirect examination:

New ties had been put in that place when I went there last week. That is picture No. 8. In other words, those ties are not there now.

MRS. LUNSFORD, called as a witness in behalf of the plaintiff, first being duly sworn, testified as follows:

Direct examination:

I am the daughter of Mr. James M. Cox, engineer on the Southern road, who was killed February 14th last year. I am married. My mother was dead at the time of my father's death. She had been dead about a year and a half. After my mother's death my father lived with us. He had a residence there in one of the suburbs of Atlanta, East Point. There were six rooms and a breakfast room in that house, and was a modern house; plumbing, bath and all sort of modern improvements. After my mother's death my husband and I and child moved into the house

with my father and lived there. He turned the rent and [fol. 83] use of the house over to me. The rent of that house was worth, taking the prevailing rate for houses like that in that neighborhood, between $35 and $40 a month, something like that. My father contributed to me by employing help; he hired a maid for me and paid her $20 a month. I had that maid all the time I lived in that house that year and a half. My father gave us other things from time to time; he gave us a Ford just a little while before my mother's death. He gave me some furniture for the boy; he gave the boy a dollar a month for his bank, and trips he was in he gave him nickels and dimes for his bank; he gave me a dining-room suit and several other pieces. My father's age at the time of his death was 59. His health was good. He smoked a little bit, very little though; he wouldn't spend very much on smoking. He smoked a pipe mostly, occasionally he would smoke a cigar. He would buy just little cans of tobacco, Prince Albert. He wouldn't buy over three or four of those a month. They cost fifteen cents apiece. He smoked mostly a pipe and a very little one at that. He would buy about one winter and one summer suit a year. His winter suit would cost him fifteen or twenty dollars I guess, and his summer suit would cost him eight or ten dollars, something like that. He was very easy on shoes; he bought about two pair a year. He would pay three or four dollars a pair for them. He worked in overalls when he ran his engine, and they cost a dollar or a dollar and a half a suit. He wouldn't use over two suits of overalls a year. I had charge of having his underclothes washed and laundered for him. He would get about two winter suits and two summer suits, new ones, every year. I really don't know what those would cost him, a dollar and a half a suit at the most; he bought very cheap clothing. He stayed at night very often in Birmingham. I think there was another railroad man with him. He stayed at the Terminal Hotel in Birmingham. I [fol. 84] paid a bill for $5.25, I think it was, and I think it was for two weeks; that would make it about $11 a month for his room, something like that. I don't know what his meals cost him. He spent about one night in the week at home, and about six nights in Birmingham, or on the road. When he came in on 40 he would eat dinner at home. He didn't always come in on 40. He ran passenger

trains, but he ran all of them, extra passenger work. I don't imagine he would go over 25 cents a meal the way he spent for other things. His regular expenses, outside of his clothing, would not exceed $35 per month; and his clothing that I have described, in addition to that, his two suits of clothes a year, winter suit and summer suit, is about the expense he incurred. He was not a drinking man at all. He paid $20 a month for my maid.

Cross-examination:

He only went about one night a week, one whole night a week in Atlanta at my home. He didn't run between Birmingham and Atlanta and would spend one night in Atlanta and the next night in Birmingham, and the next night in Atlanta, he didn't do that. He spent most of his time away from home. I saw him very rarely, his lay-over was mostly in Birmingham. As to what his expenses were in Birmingham, for meals and other expenses, I don't imagine he would spend very much, about 25 cents a meal. I know that because he didn't spend very much on himself, and I have been with him when he bought things for himself; before his death, I don't know how long ago. I was never in Birmingham with him; he came in on 40 occasionally and I would be with him then. I have an idea what he would spend on meals in Birmingham. It is not just a guess, I have eaten out with him in Atlanta. I don't know the definite amount of his expenses in Birmingham. I know about what he paid for his clothing; the price tag was on the suit when [fol. 85] he would bring them home. My mother died October 28, 1931. Prior to her death my husband and I had been living to ourselves; and my husband had been supporting me in a way. What I mean by "in a way", not in the way I was supported after we moved in this house; and after my mother's death my father simply asked me to move out to his house and he would live with us; and I charged him no board or room rent or anything of that sort. My father had an automobile. He had had that automobile, the last one, the one he had when he died, I can't be positive, about a year I think. He had the expense of that automobile, the upkeep of it. He kept that automobile in the garage; when he was on the road it stayed at home, there at the house. He used it when he had a little business to attend to. Every month-end he would go to his sister's

or brother's or something like that. I just couldn't be positive whether toward the end of the month; he would usually finish up his month's work about the 24th, I didn't keep up with the dates; I just couldn't be positive whether he would only make twenty-four or -five trips a month. Always at the end of the month he had a few days off, and he went to his sister's and brother's, visiting his relatives, and he would use the automobile for that purpose.

Redirect examination:

My father had a room at the house; he did not cost me anything at all. My husband has lost his position with the cotton people; and he finally got a job with the government under the Civil Works Administration. He is making $18 a week now. I have used my father's auto at times. My father was out on the road most of his time.

Recross-examination:

I just don't know exactly how long my father had been running as an engineer; he started running when I was born I guess, I just don't remember exactly. He has been running as an engineer something like 30 years or more. [fol. 86] He owned a home in East Point at the time of his death. That is the house I am speaking of now. He had no other property, that's all he had; that and the automobile was all he possessed at his death.

H. A. Cox, called as a witness in behalf of the plaintiff, first being duly sworn, testified as follows:

Direct examination:

My name is Hubert Allen Cox. I am the son of Mr. Cox, the engineer that was killed February 14, 1933. I am 39 years of age. I was a railroad man, I would say, around 15 years ago. I worked for several different roads, and worked for the Southern between six and seven years on the west end, between Birmingham and Columbus, Mississippi. I ran several trips between Atlanta and Birmingham. I had a stroke of paralysis, it will be four years this coming March. It left me in a very bad condition; I am not able to work, I can't hardly walk; I haven't got any balance of

myself and I have to use a stick to walk. What makes it difficult for me to walk is that I haven't got any control of my ankles; that is where the paralysis is. I haven't been able to do anything except drive a truck and one or two other things since I had this paralysis. Up to the time of my father's death, and since I have been paralyzed, my father supported me and my family. I am married. This lady is my wife, and that little girl is my step-daughter. I married a widow. In the last four years, up to the time of my father's death, he contributed to me, I would say, on an average between $40 and $45 a month. Some months he would give me $40 and some months it would run up as high as $60. He gave me the cash; he gave it to my wife mostly. That was all done for my support and the support of my wife, who was dependent upon me. I tried to work but I [fol. 87] found I couldn't; I tried to drive a truck. I delivered ice. I can drive a car. I didn't make anything at it at all. My father bought the truck and gave it to me. He paid $250 for it. It was a Ford truck, ton and a half; he bought it second-hand. Since his death I have been living in Meridian, Mississippi. For a while I lived in Atlanta. I have made an effort to get work with the C. W. A., but they turned me down; they said I had an automobile and $20 a month and was not entitled to it. My wife and I both went to them and wanted to do something. I wanted my wife to take a job as a home solicitor, home visitor, and you have to use a car and drive all over the country. I examined the Southern Railway track down there by the side of that church down there last Thursday. I went up three-quarters of a mile to the first right-hand switch and looked at it there too, there the derailment was; I mean just before it turned over. I picked up also some of those rocks that were lying around opposite the church, around the track, to see what material they were. I am shown picture No. 4; it does not represent the condition the ties are in now. This is the church where the first derailment occurred. These ties are practically the same. I railroaded, I would say, around 15 years as locomotive fireman. I picked this rock up near that place. It is pulverized into sand here, I did that; I taken it to my sister's house in Atlanta and taken a hammer and tapped it about as hard as you would tap a pecan and it crumbled up. I tapped it with a hammer and made that sand out of it. That is the kind of rock that I found near

this place. Mr. Holcombe, the deputy sheriff, was along when I found that rock; the gentleman that was on the stand this morning. In my experience as a railroad man my train has run over rocks and objects of that sort on tracks time and again. I have run over road crossings for a distance of as far as from here to the wall over there with dirt [fol. 88] and rock and sand on the track. I never had anything like that to derail the train; I never heard of a rock of any kind knocking a train off a track at any speed at all. In that particular curve, that rail sets in a kind of slanting way, and most all other curves they sit kind of this way (indicating). I don't know much about the degree of curves. If a rock had been lying on the track, in my opinion the vibration of that heavy train would have shimmied that rock off of there, because the engine and cars striking the rail joints, there is a tap to it, and the top part of the rail is very narrow and slanting and very slick. I have run over rocks a great many times with trains that I have been on. I have run through water for a distance of three or four miles two feet deep, running over limbs and treetops and rocks and other things. When that rock is struck by an engine weighing, say, 140 or 160 tons, in my opinion it would knock it off, it might. If it hits it and runs over it, it just crushes it up. That rock crushed up is almost the same as common sand. You sand the track to keep the engine from slipping when starting the train. We use sand lots of times just about the same as that on locomotive engines, with pieces almost as large as these coming out of the sand pipe. I couldn't tell you exactly how high the cow-catcher sits above the rail; of course, it will vary, because after they put them on they will sag; I would say 2½ to 4 inches. When they put a new pilot on there I would say it is around five inches or a little better. After they run a trip or two the vibration of it will settle it down to around 2½ or 3 inches, maybe four. About the average height from the pilot to the ball of the rail would be about four inches I would say. Any rock that would be as high as that, four inches or four and a half or five, that pilot would knock it off. The pilot extends over the rail. A wheel itself doesn't always crush a rock; it knocks it off. [fol. 89] Before my father gave me this last truck, he bought me two Ford cars before that, and he put me in the pressing business twice in Atlanta. I was not able to make any money

out of it; I didn't have any success at all. Besides this money that he gave me, he practically bought all my clothes. He bought the suit I have on now; he gave $11 for it. It is a duplicate of the one he had; I have got that at home now. He was about my size, maybe half an inch taller. He bought all my clothes. I wore out about one suit a year. Generally when he would get him a suit he would come and get me and go and buy me one.

Cross-examination:

I can drive a truck pretty fair; I can drive a car all right. In order to drive a truck you don't have to have a good deal of strength in your ankles; you don't have to have any in your ankles at all, you are sitting on a seat. I can sit back against this place here and push this desk over and yet not have any strength in my ankles, because you are pushing from your back and hips on the brakes and clutch. I have got a straight movement of my legs, and sitting in a car I have that straight movement, because I am very short. I have the same thing in my car. That doesn't require strength in my ankles to amount to anything. I made a failure twice in the pressing club business. It was not exactly a failure in the ice business; I had to give it up on account of the trust raising the prices on us and we seen there wasn't any use to operate. When my father would furnish any money for the benefit of my family, he would always give it to my wife. If he wanted to buy me anything he took me to the store and paid for it himself. I was a locomotive fireman, and have operated on a passenger train. I couldn't tell you exactly how many times, mostly on the Illinois Central, between Birmingham and Jackson, Tennessee. I fired the Seminole Limited between seven and nine [fol. 90] months is my recollection; and I did fire on the G. S. & F., I couldn't tell you exactly how long, right after the Florida boom; three or four or five months, something like that. Of course, I have been on passengers at different times. I would say I have had around 15 years experience in railroads. You know there are times when you are cut off and may not work for three or four or six months, but still we call that railroad experience. During that time I have worked for the Southern out of Birmingham, the Southern between Atlanta and Macon, the G. S. & F., the Illinois Central, the Northeastern, I didn't make but two or

three trips there. I was on the A., B. & A. along about 1916; I worked over there a trip or two; that's about all I can remember. I had no regular job, an extra man has not got a regular job. I had a regular run on the Illinois Central, and I had a regular run on the west end of the Southern. I couldn't say exactly how long I had a regular run; we might hold a run three or four or five months and get rolled and be on the extra board four or five months and bid in another regular job. The rock I spoke of, that's the rock I got down there last Thursday, nearly 11 months from the time my father was killed. I don't know what size the rock was that was on the track at the time the engine run over it; I didn't see the rock. I know nothing whatever about the rock that the train actually struck over there on the day when it was overturned, only this rock corresponds with the piece that they say was run over. I said a little while ago that I picked up a little piece of this rock that I have that I got there last Thursday, and I said that they sometimes sanded the track with pieces almost as large as that; and that was a little piece about the size of that you have in your hand, about 1/16 of an inch in diameter, as going through the pipe. I was not familiar with the particular engine my father was running at the time of this [fol. 91] accident, but I have railroaded with engines of the same type. I don't know how high the cow-catcher sat above the rail; none of them are the same height. The only time I have ever been to the scene of the accident down there was last Thursday. I couldn't say what was the largest rock I ever ran over with an engine; I would say something nearly as large as your fist, and that was a passenger train, running, I would say, between 40 and 50 miles an hour; on curved and straight track both, road crossings. Down where I run it was not customary for rocks to be on the track; it is not customary to put them on there. I didn't find that frequently myself. I said several times, that may have been three or four times in 15 years. I said a moment ago in response to Mr. Arnold's question that I ran through water and over limbs and rocks and things like that. I could tell what I was running over because I could feel the weight of it when we went over it; you could tell it was a rock, and you could tell it was a limb when a limb would come by. That was on the Illinois Central, the other side of Corinth, Mississippi, running on the Seminole Limited.

I just crept along through the water; there is more danger jumping the track running three or four miles an hour than there is at fifty, running over rubbish or anything like that, and especially around curves; it would be far more dangerous at three miles an hour than it would at fifty.

Redirect examination:

When I was running the ice business I had a helper to deliver my ice; I had my uncle and another boy.

C. G. Goff, called as a witness in behalf of the plaintiff, first being duly sworn, testified by deposition as follows:

Direct examination:

My name is C. G. Goff. I am the master mechanic of the Southern Railway Company located in Birmingham. The [fol. 92] track of the Southern Railway that runs from Birmingham to Austell comes under my jurisdiction as master mechanic; within about fifteen or twenty miles of Atlanta. I recall the accident in which the engine was wrecked on which Mr. James Monroe Cox, the decedent, was riding, I recall the accident, but I couldn't say as to the date; it was the time Mr. Cox was killed; February of this year. That train, over our line, was from Birmingham to Atlanta. It was a passenger train. I don't recall how many coaches it pulled. Mr. Cox was the engineer, and Mr. Goree was the fireman. I don't remember who the conductor was; the files will show. I did not see that engine before it left on that day, on the 14th day of February, 1933. I couldn't say when I had seen it or examined it before that day; I am accustomed to looking around the engines in the roundhouse, but I couldn't say as to just how long prior to that time; I couldn't give you any exact time on it. That type engine was what is known as the U. S. Administration mountain type. It had four driving wheels to the side; eight altogether, we call them four; there is four drivers, four wheels on each side, and the axle between, of course. There was a wheel under the cab. In the way of front wheels, it had two engine truck wheels, that would be four wheels, the two truck wheels; four wheels, and two on each side and an axle between. Those four truck wheels were in the very front

of the engine. Right off hand, I couldn't say what the weight of that engine was; I wouldn't like to make that statement. I can get it for you over the telephone in a couple of minutes; that ought to be in the files, I expect. We don't figure the weight of the tank; I don't think it ought to be figured, there is so many different kinds of engines, we have so many different types; you want the weight of the engine, not the tank. The weight of the engine was 327,000 pounds (after telephoning). That engine was manufactured by Baldwin, I imagine; I am pretty sure it was, Philadel- [fol. 93] phia. That engine was built during the war under the government; that is where they get the name U. S. Administration type. As to what kind of a framework there is that keeps those wheels together, and that the engine rests on, it is a steel frame with a casting in the center of it and pedestals that fit over the boxes that go on the wheels; you see the box goes on the wheels, on the axles; then the pedestal is fastened to the frame and it fits down over it. That is not the casting I am talking about (indicating on blueprint); the pedestals are fastened to all four corners of the frame, and they slip down over it just like the shape of my hand here. I could draw that roughly; there it is, the center casting, it comes down like that; that is the shape of it (indicating on diagram) you see here is the frame, that is a side view of it looking down on it, here is the pedestal, here is the axle, here is the box slips down on the axle, and the pedestal slips down over that, and this casting here is in the center of the frame; here is the casting on the engine that fits down inside of this where it drops in there like that; this is the engine up here; this is a side view of it; here is the front end of the engine here. That is the way it is; here is the front of the engine, here is one truck wheel, and here is one here. Let's draw that front of the engine, there is your cylinder, the cylinder is right in here, and here is your stack on up here. This thing that you are marking out here is the center casting. The center casting on the engine fits into the center casting on the truck, what we term the male and female center castings; the male goes into the female. This No. 2 here is the casting that is fastened to the steel truck frame; and the part called the male No. 1 from the engine goes into this opening No. 2 on the truck frame. As to how far in there it goes, they vary; this particular one was approximately 3 inches. There

[fol. 94] is a center pin that goes down through here to hook it in there and keep that No. 1 from coming out if there should be any rise in the front end of the boiler; that goes through that way; that center pin is marked 3; it is not keyed at the end in any way, it just rests on gravity, the weight of the engine is all that holds it in. If the engine was turned upside down, it would fall away from the truck. The weight of the engine hooks that truck into the body of the engine or the boiler of the engine and safety chains. Those chains are located on the front end of the truck frame. This would about show where they are, somewhere along there, right at the front end; they fasten to the main frame of the engine. There are none right on the back; they have just two chains on the two front corners of the truck. To make myself clear, it is a matter of impossibility for the engine to get out of the center casting unless it is derailed, because the weight of the engine holds the truck on the track; the weight of the engine would hold it as long as the wheels were on the rails; but if it got derailed, that center casting would get out, by the truck dropping; the truck would drop, and the belly of the engine would be held up by the driving wheels; and that would enable the truck to drop. In this little rough drawing we have got here, that you have marked "A", this is a side view of the frame here. You see that truck frame—those are rails I am drawing there, that is looking down on it; you see, here is the frame made in this shape, and the center casting is in here, and here is your wheels on either side. This second figure we have drawn on this rough paper "A" looks down on the truck frame; and these 4's represent the wheels; figure 5 represents the axles; and figure 6 represents this center casting, by which the engine reclines on the truck by its weight. You see, there is two springs here that come under this frame to make it ride easier. I don't know whether I [fol. 95] can make myself clear to you or not; here is the engine resting on this center casting, this frame is all sitting on this center casting, No. 6, on this frame like that; then the springs are located underneath the engine truck frame. Let me get this clear in my head; you see, here is the boxes, taking a side view of this thing, here is the box, here is the axle, here is the engine truck, the box goes here, now there is an equalizer rests on top of this box, on the top of this box; then underneath here there is a spring that rests under

this engine truck frame; there is a spring hanger that goes from here to this equalizer, there is a pin located in here and a thing here that holds it, in other words keeps this frame up off of this box, and makes the engine ride better; the weight of the engine is carried on this spring, the equalizer rests on the top of the engine truck box. Mark that spring No. 7; the spring is what holds the weight of the engine up; and the spring where it attaches to this equalizer rests on top of the engine truck box; and the engine truck boxes are on top of the engine truck brass, that does rest on the axles; either the box or the brass rests on the axle. In other words, the axle holds the engine up. When those front trucks are derailed, supposing both of them are derailed, as to how much distance they fall on our main line track between here and Atlanta, the height of the rail, as to how much distance they fall, I couldn't answer that; the roadway people will have to give you that; I couldn't give you any accurate idea on it. We have hundred pound rails, but I don't know the height of them; I never measured one of them, I don't know the height of them. Whatever the height of that rail is, when those trucks get off, that wheel would drop to the tie or the ballast, one or the other. Just from general observation, I would say the ballast is usually up to about the level of the ties. As to the effect on that front part of an engine when that [fol. 96] truck gets off the track, the effect on this truck as regards its connection with the engine, the effect on those chains, and the effect on this center casting, I would answer that by saying that the engine truck disengages from the engine and throws the weight on the driving wheels, and there is no weight on the engine truck at all, it is loose.

As to how many inches this center casting penetrates, it varies on different class engines; on this particular class of engine it is probably three inches. If the truck dropped five inches, that center casting would drop out; and then the only thing that would hold the truck would be those chains in the front. They are attached only to the front end of the truck. I couldn't give you the dimensions on that truck. The engine truck carries the weight of the engine. It is not the length from one axle to the other, the truck frame is longer than that; but it is at least that long and longer. When those chains are holding up the front end of the truck, if that center piece is disengaged,

the back end of the truck will just drag along on the ties. As to how much play there is in those two chains at the front end of those trucks, when the wheels are on the track, in other words, if I should tighten it, as to how much I would take up, I couldn't answer that, because it will vary on different type engines. On this type of engine we set them to meet the track conditions; we have track conditions on some parts of the line that require a longer length than others; it is what we term under the Interstate Commerce Commission requirements, the proper dimensions, a safe and suitable length to afford proper clearance. I can't state how many inches it was. There is a rule of the Interstate Commerce Commission, but they don't specify the length; that only means that it should be reasonable. It depends entirely on the track conditions, curvature, etc. If those front wheels should become derailed, [fol. 97] as to whether they would hold it right up, hold the wheels up to the same level they were at before the derailment, would depend on the length of them. My experience has been that the chains are put on there to hold the engine truck on the ties in case of derailment; so as to keep the truck from becoming a foreign body and getting under the belly of the engine; it is intended for that, and also to keep it from leaving the cross-ties. We have a device on that engine known as Wright's Little Watchman. I couldn't answer how long we have been using that device on those Southern Railway passenger trains. They were not using them when I came to the road. I have been master mechanic sixteen years. I couldn't answer how long they have been using this Wright's Little Watchman; I don't think ten years; any statement I made would not be accurate. The best recollection I have of it probably is five or six or seven years. I couldn't answer as to the other divisions, but we use it on our division here, on the majority of the engines. This engine was equipped with it. As to the construction of that Wright's Little Watchman, I have got a print of it here. This is the watchman right there (indicating), this is the frame that fastens to the engine truck, this is the pin that works right in here. Mark this first drawing I have given you No. 8, and the second one No. 9; this first drawing represents, where I have got it marked "Trigger", the object that is called our Little Watchman. The trigger extends to the front

end of the engine; they can be placed in both ways, there may be some of them equipped both ways, but the majority of them are equipped with the trigger—let's see, I am not sure; it don't make any difference how they are placed; we may have some placed both ways. I believe, I am not absolutely sure, but probably this one was setting back toward the train; really that feature of it don't make a bit of difference. This trigger can either set back towards [fol. 98] the train or set from the engine towards the cow-catcher. The framework of this body does not rest on the cow-catcher or pilot of the engine; it is fastened to some part of the frame of the engine. This is the valve in here, that is just the trigger part, that is part of the trigger. That trigger, if it is moved up or down or to either side, or in any other direction a certain distance, that opens the valve and permits the air from the train line to go into the atmosphere. The train line is coupled to the Wright's Little Watchman, the train line was, rather. This place here up there to the train line is where the air from the train line contacts with the Little Watchman. There is a certain pressure of air in that line; we carry 100 pounds train line pressure and is pumped up from the locomotive. As to the pounds used in giving a service application of air to the train, the engineer braking, he can make the service application on most any pressure he wants to; usually they make—well, they vary; some engineers draw off six or eight or ten pounds of air. Our gauge shows how much we are drawing. If you want to make an emergency application it takes more than twenty pounds. I couldn't answer how many pounds it would take. When this trigger is moved sufficiently to attempt to open the air line, as to whether it makes a service application or an emergency application depends on the distance that the pin is moved on the front; the violence of the opening. To make this clear to you, there is a slot right here, and when that pin is moved enough, that will come back in here, it has just got a leverage to fit, it depends on how much this valve is pulled up from the seat; it is possible to make a service application with this thing, but if it is a straight drop, it opens that valve wide enough so that this thing comes back in here and locks, and the only way you can shut it off is to operate this thing down here; it is possible for it to [fol. 99] make a service application, and possible to make

an emergency application; if it is violent enough and extreme enough, it will make an emergency application. This trigger, if it moves up at the back end of it, that enters here and pushes that valve off the seat, and back in this corner here and admits the air from the train line to go to the atmosphere, and the effect of that is to put the brakes on the train; that is the way you apply the brakes. If this back end of this trigger is moved violently enough it will open the valve wide enough to let enough air out of the train line into the atmosphere to make a very violent and an emergency application. As to who it is that controls the setting of the frame around this trigger that it comes in contact with, if this device is cut off, and as to who it is that designs the distance from the trigger that those lines like Figure No. 9 sets—well, I will tell you, that is at an experimental stage; we never have determined the exact distance for any of them. It depends on the curvature of the track; in other words, we have some conditions in the yard that are very much different from what they are on the main line, and we have to set them to suit the worst conditions we have, and it is in an experimental stage, that feature of it. A curve can set this watchman; we have some of them set. The only effect when it is set is to stop the train. We have had a number of cases; I don't know exactly how many we have had, we didn't keep any record of them; sometimes the engineers, of they set, never say anything about it, get down and pull them back and go ahead. There is no way you can disconnect this watchman with any valve or wheel or apparatus about the engine out on the line of road. It could be done; it is possible. They would have to disconnect the union in this pipe line that carries the air to the watchman and plug it up; a man could do it all right. I don't recall any valve or lever there back of this pipe line that could cut [fol. 100] it off before it gets there. We had one case that I recall where the front trucks derailed and this watchman operated several years ago; I didn't see that, I was just told; I was told it operated, I didn't see it. We might have a record of the times it has operated in the office, I wouldn't say; that is the only case I know of personally. There were no others reported to me where it operated, by engineers or anybody else. As to there being any way to keep it from operating if the framework comes in contact with

the trigger, from the construction of the valve, it would appear that it would have to work. It would operate, of course, to set the brakes. I went to this wreck after the engine turned over and looked at it. The engine was not set up when I got there, it was still laying on its side. The front trucks were torn up, but not entirely disconnected, there were laying right underneath the engine, as I recall; the safety chain was still hooked up and everything, it was just laying there like it turned over. The safety chains had not broken, but the casting was disconnected.

Q. When the engine turned over, that separated the male part from the female part?

A. Laid out like that.

This trip bracket I have marked in No. 9, that is attached to the truck frame of the engine, and this Wright's Little Watchman is attached to the frame work of the engine somewhere; they are all put on the front end. The pin can be operated either way, either in front or behind. Here is the trip bracket. I made a statement there that it was approximately five inches up and down this way, vertically, and approximately eighteen inches from side to side. That trigger is set in the center of it; it is located in the center of the bracket there. If the bracket is five inches, it would be half that distance before it came in contact with it. That trigger, as well as I recall, is approximately 5/8 or 3/4 inches in diameter; take that from five inches, that would leave [fol. 101] 4 1/4 inches, and the frame work would only have to fall about 2 and 1/8 inches to hit that trigger; approximately that, as well as I recall, these flanges are approximately 5/8 of an inch; they may be a little more than that. I don't know how much play that chain has, how much they would allow the wheels to drop below the top of the flange; I don't recall that. I don't know the height of the rail, but, supposing the height of the rail and the tie plate under it is 5 1/2 inches, and the trucks got off the track so as to make a mark on the ties, that truck frame would have to fall off the rail from 3 to 4 inches. This thing here, that is the flange. As to how far down on the inside of the rail it projects down here, the government requires one inch; it depends on the wear of the wheel; some of them will be

longer than that. A new flange is one inch long; so that if the rail is 5 inches high, and that wheel gets off the rail, and that point of the flange hits the cross-tie and holds it up, that frame will have dropped 4 inches, the flange being an inch high; you take that inch from the 5 inches of the rail, and your frame would drop 4 inches; taking it for granted that the height of the rail and the tie-plate together is 5 inches, that would make that drop 4 inches. Now, take a side swipe, you might call it, on those trucks; if the trucks got off the rail and got on the inside from 6 to 12 inches from the rail, and there are points on the same, I mean on the cross-tie where it would be from 6 to 12 inches from the rail on the inside and 6 to 12 inches on the outside, if I understand what you mean; if it moved 6 inches, it would be 6 inches off the center line either way. We have 18 inches lateral play there on account of the curvature. We give much less play up and down vertically, that is only 5 inches, because if the truck drops, we want that to affect the trigger either way almost instantly if the truck gets off. [fol. 102] The man that got it up intended to put it on there to stop the engine, instead of the brakes, in case of a derailment; in case the first front truck got off. It only applies to the front truck, and the object was to apply the brake on the engine just as soon as the front truck got off; we have some engines that have some of them on the tanks; I don't know whether we have got any of those here, or not. I wouldn't say it often happens that the front truck comes off; we have some cases, I won't say it is very often. The most vulnerable point on the engine in running on a road with a good many curves is not necessarily the front trucks; we have had cases where the front drivers would get off. I couldn't say which gets off oftener, the front trucks or the drivers; but this particular appliance is for the front trucks, because it is attached to them. I did not test this watchman after I took it off; I understand that Mr. Stewart, the superintendent of motive power, had it tested; I don't know it; I know they told me they did test it, that is all I know about that part of it. When I got there, the truck, as I say, was all laying over there; the truck part of it was all disconnected from the watchman part of it, from the trigger part; naturally, it would be. The trigger part of it, and the air pipe to the train line, had been taken off; Mr. Stewart had it taken off. It had

been taken off when I got there; he had it taken off for the purpose, I understood, of having it tested. I don't know how long it was after the wreck that I got there; we were called there right immediately after it happened, and we left here within forty minutes I would say, forty minutes to an hour from the time the derailment occurred, we left. Of course, you don't make very good time with a derrick, about 25 miles an hour; I don't recall now just the time we arrived there. I walked down there, but I don't remember a negro church. I saw the place down there where it looked like wheel marks on the rails and the place plowed [fol. 103] up there. I couldn't answer how far that was from where the final wreck and turning over of the engine occurred; I don't recall; it is between half a mile and a mile. I don't remember so much about a reverse curve with two curves in there. I couldn't answer what degree curve it was where I first saw these marks. The marks that I saw were right where it got off, were on the tie-plates and on the ties, too. You could track the marks off and on, not on every tie, but on a number of ties; you could see them pretty well all the way up from where I first saw that mark up to the place of the final derailment. I remember the mark on the outside pretty well, I am not so sure about the mark on the inside; there probably was. There was no doubt about that being the mark of the flange. The furtherest mark from the inside of the rail that I noticed of the flange from where the point of derailment began, from the inside of the rail to the outer edge of the cross-ties, was, I would say, around six inches, I don't know, probably a little more, but I couldn't say exactly. The marks on the outside of the other rail would have to be the same. I saw where the wheel finally struck that switch going out to the right where the engine turned over; I saw the marks all the way up to that, where it was finally derailed, but I don't recall so very much about them. You have got the wrong man if you want to examine me about this derailment; I thought I was going to tell you about the watchman. This plat marked No. 10 might represent a general view of the track from the point of the first derailment up to the final derailment on that switch of the east passing track; this is the only part that I recall here; where the derailment occurred is on this curve up here; I don't recall this part in here. I don't recall a sort of reverse curve there. We

don't know whether this watchman worked on this occasion or not. We don't know whether it stopped the train. [fol. 104] We don't know whether it put the brake on; we couldn't tell about any indication that the brake had been put on. If the brake had been put on in emergency down at this point of the first derailment, and if the train was running say 40 to 45 miles an hour, about the average speed along there, as to within what distance the emergency brake would have stopped that train, you will have to get an air brake expert to answer that question; I couldn't answer it. I wouldn't consider I am enough of an expert to answer that. I never have run on trains. I fired on an engine a little bit; but I wouldn't consider myself a trained man. I have applied brakes, but I never applied them to see about the distance. I wouldn't say I could stop that train easily in 150 or 200 yards; I wouldn't say one way or the other; I don't know about that; the practical men that operate the brakes are the men that could tell that; experienced men that run on engines, engineers and firemen. If this trigger had been set, this Little Watchman could have been locked after the wreck and it couldn't have been; if it goes over far enough, it is supposed to lock; as I said awhile ago, that is what it is for, to pull it down. If it goes just far enough to make an emergency application and stops the train, as to whether it rights itself again then, or has to be pulled back, that depends on how much that trigger moves up and down. I couldn't answer how much it would have to move before it would lock it, because, as I said at the start, they are in the experimental stage, and they vary. The wheels could not have dropped any further than the ties or the ballast, and they had to drop that far to make marks on the ties; so the chain had at least enough play in it to let them down that much. As to whether the chain could have held up the front wheels and let the back wheels down depends on the length or the chains. The chains were attached to the front corners of the truck. Whenever those front corners drop, that would bring that frame closer to [fol. 105] the trigger of the watchman. Whenever the wheels dropped, they pulled down the truck frame and pulled down this little trip bracket that sets on the frame; and the question of springing the trigger depends on how far the truck frame drops, if it has a drop; that is the principle of it; and on the side view, it depends on how far

it shifts to one side. You could have made the trip bracket much smaller than that, but I don't know whether it would work or not; you could make it any distance you want it; it is a question of whether it would set the watchman or not; that is what I said awhile ago in the beginning, that feature of it is still in the experimental stage; in other words, you can take an engine on the Birmingham Division and set it one place, and run it from here to Chattanooga it would have to be set on another, and if you run it from here to Meridian, it would have to be set on another; it depends on the kind of track you have got; whether you have got sharp curves on it or not. This particular engine has run on this division only for the last six or seven years, I know. I don't know the rules as to the elevation of the rails, etc. I have never had any personal experience with objects on the track derailing the front trucks of an engine; I have heard of cases. As to how close the pilot sets to the rails, it varies; the government requirements are a minimum of 3 inches and a maximum of 6 inches, anywhere inside of that. I couldn't say about this engine; I couldn't answer that intelligently, because I did not look at it; you see the engine was turned over, it would just be a guess. The government requirement is between 3 and 6 inches. I just looked at the flanges of these front trucks in a general way. They appeared to be in good condition. I don't recall seeing any marks of anything on them; of course, they were down there in the mud, and you couldn't tell much about them. I couldn't see the wheel. I don't remember seeing any marks on them of any sort, because the wheels was buried in the mud.

[fol. 106] Cross-examination:

I am the master mechanic of the Birmingham Division of the Southern Railway, and I have the A. G. S. Division, and the Northern Alabama also, and the A. G. A., and in that connection I only have supervision of the rolling stock, locomotives, cars and shop force; and I have supervision in the shops of the repair work on the engines, cars, etc. I have nothing whatever to do with the maintenance of the roadway, and nothing whatever to do with the transportation or the designation of the curves or anything of that short. My job keeps me pretty closely confined to the shops at Birmingham. I do not personally make inspections of the en-

gines on each trip; I have inspectors for that purpose. When anything is reported out of order with an engine, it is simply brought to the shops for repairs; and my job is in seeing that those repairs are made, general supervision; giving directions in a general way. This Wright's Little Watchman is just in an experimental stage. That experiment has been going on with engines on this division of the Southern Railway, within my knowledge, for five or six or seven years. As yet, it has never been demonstrated to be a perfect appliance in the operations; and its operation depends on the roadway conditions, the curvature of the track, the height of the track and everything of that kind; and you have to adjust the framework and the trigger in such a way that it will not block the wheels of the train in the practical operation of the train; and to do that, you have to adjust it for the most extreme conditions that you have to meet in the operation of that engine; and I might say that we have had some delays to trains on account of this device setting; and that would then involve the necessity of increasing the size of the framework; and also we have had some trip brackets, we have had some of the trip brackets to set at different heights on the same class engine; in other words, we couldn't make them exactly the [fol. 107] same thing; we have set them the same thing and had them to set the brakes in emergency on the line of road. This trip bracket is the same thing we have been referring to here as the framework of the part. It varies on different class engines; I know of one particular instance that we set the bracket the same distance as another engine of the same class, and it set the brakes in emergency on the line of road. We applied them ourselves; they have to be put on entirely. At times it wouldn't set using the same engine.

Redirect examination:

This same engine has never jumped the track before, that I know of; I don't know about that. We have not been using them on all the engines for five or six or seven years; we have been putting them on gradually. We have had some of them at least five or six or seven years. I don't know of a single passenger engine between here and Atlanta that hasn't got one of them; as I said in the beginning there, five or six or seven years; I meant we had been applying a number of them gradually, gradually increasing

them. We quit for a while, and then we started to putting them in again, and have been increasing since.

THOMAS H. DAVIS, called as a witness in behalf of the plaintiff, first being duly sworn, testified by deposition as follows:

Direct examination:

I am in the employment of the Southern Railway as passenger conductor. On the 14th of February, 1933, I was running on a passenger train which was carrying passengers and mail and express from Birmingham, Alabama into Atlanta, Georgia. I was conductor on the train. I recall a negro church and burial ground about a mile west of Bremen that we passed there on the track. As we passed that negro church, the speed we were going on this day was [fol. 108] right around forty-five miles an hour. I remember hearing the engineer blow the station signal; he blew it about that church, right somewhere close to it. That is about a mile from Bremen, approximately a mile. I did not notice anything wrong in any way whatever at that time. As to where we were when I first noticed any derailment, or any putting on of the brakes, or anything unusual, as to how close to Bremen we were, that passing track is about twice the length of the passing track, it will hold about thirty-two or three cars, about sixty-five car lengths, I imagine, from the station. We were about that first right-hand switch going into Bremen, coming this way, when the engine jumped the track. When the engine jumpad the track I was standing on the platform of the first-class coach. The engine jumped the track about a quarter of a mile from Bremen; it finally turned over about that place. I did not afterwards look at the marks where the front trucks first got off the track, I just went to the rear of the train. I didn't know of any trouble at all until just about the time the engine turned over. Just about that time, I don't know that I felt the air brake go on; the car was bumping and jumping, and riding so rough, that I was on, riding so rough, that I didn't feel the brakes. I knew something was wrong by the car jumping. Between the negro church, that was about three-quarters of a mile west, and this place that

I noticed the car was on the ties, the brakes had not been put on at all, so far as I could notice or tell, either a service or emergency application; neither one had been put on up to the time it got off the rails and I felt the bumping; I didn't feel any brakes. I didn't know there was anything wrong all that time. I did not know that the front wheels of the front truck got off about that negro church; I didn't know there was anything wrong until just about the time of the wreck. About the time of the wreck and the engine [fol. 109] turning over, it was running just about the same speed, about forty-five miles an hour; that was about the usual speed. He hadn't begun to slow up for the station at that time. He usually began to slow up for the station when we got nearly the length of that passing track, the east end of it, he began to slow up. As to how close that was to the station at Bremen, it was about thirty car lengths, freight car lengths. A freight car will average forty feet. He would begin to slow up about thirty car lengths from it; they would begin to brake right at the east end of that passing track; something like three hundred yards, thirty cars forty feet long.

Cross-examination:

Mr. Cox was just what we term an extra man; he runs all the runs; the regular man has to lose two trips, I believe it is, a month, and he comes in and runs all the runs, takes it time about just like he had a regular run, but he runs all the runs; he just shifts about from one run to the other; my regular man had to lose that trip, and he come out in his place. Mr. Cox did make that run, though, at regular intervals, and at times, of course, he would catch these other runs. As to how long prior to the day of this accident was the last time he had been over it, had made that run, I can't say, because I didn't see him. If he works regularly, he comes out of Birmingham a train ahead every time, he just comes up one trip, leaving Birmingham this morning which would have been on that train; if he wasn't working regularly, the next trip when he goes out, he would go out on a train ahead of it, at 11:55 at night. We had the same engine that usually pulled that train, regardless of the engineer that was pulling it. Before leaving Birmingham I checked up on the brakes and all of my train; I saw that they were all fully operating. When the accident occurred I did not

go back to make any investigation as to what caused the [fol. 110] derailment myself. The first thing I did was to go up to the engine. My train on that day consisted of Engine 1483, and a baggage and mail car; then a combination baggage and coach followed it, then the first class coach was next, the Pullman next, and the dining car next, and a coach on the rear for extra travel that day. We had an engine and tender and six cars. We had not experienced any trouble of any kind in the handling of that train from Birmingham up to that point, or at any other point; everything running usually and normally.

Redirect examination:

I went up to the engine. I didn't see the engineer, but in about less than about a minute after I got to the engine, I saw the fireman climbing over the tender. I couldn't tell that the engineer was dead when I got up there; I didn't see him. It fell over on his side, on the right side; it kind of turned down in elbow shape.

E. Dowdle, called as a witness in behalf of the plaintiff, first being duly sworn, testified by deposition as follows:

Direct examination:

I work jointly for the Southern Railway Company and Southeastern Express. I was both baggageman and expressman. I run on passenger trains. On the 14th day of February, 1933, I ran on a Southern train that was carrying passengers and express and baggage from Birmingham, Alabama, into Atlanta, Georgia. The number of that train was 40. I don't remember a negro church and burial ground about a mile before you get into Bremen, nor have I ever seen it, nor have I ever noticed it. I did not notice anything wrong about this train as we approached Bremen, up to the time it got off the track, up to the time my car got off the track; that was the first I knew that anything was wrong. That was at that right hand switch, going into Bremen. Where it all got off the track, and where the en- [fol. 111] gine turned over, as to how close that was to the depot, I wouldn't—I won't say, I wouldn't say exactly, because I didn't get out of the car for some time. Whenever

my car got off the track was the point of derailment. I felt my car on the ties. Up to that time I did not know anything was wrong at all. My first feeling or knowledge as to anything being wrong was just the car jumping and jerking like, and, of course, the freight began to move, the express and baggage in the car. When my car got off the rails was the first I knew anything was wrong; and that was just a little after the time the engine turned over. I imagine it ran on the ties after getting off about eighty yards; I think there was anyway, there was about, as well as I remember, about this eighty yards of the train off, that is, the engine and tender and three coaches, I think. It ran about eight yards jumping the ties, that is, I won't say my car ran that distance, for I don't know about that, but there was about that much of the train off the track, as well as I remember. Up to the time my car got off the track and began to bump the ties I did not know anything was wrong at all. I did not feel any brakes put on up to that time. I did not feel the air brake put on after my car began to bump. I didn't even feel the air put on then. I didn't know anything was wrong until the train stopped, it was all so quick. If any brakes were put on, I didn't feel them at all; I didn't hear the air escape, or anything. All I heard was my car bumping along on the cross-ties; it seems to me like, I won't say, the body of the car just settled on the ground; there was a little shake there, it all hapened so quick, I wouldn't—at the time that this occurred, I wouldn't say we were running about forty-five miles an hour. It was just about the usual speed.

[fol. 112] Cross-examination:

My car was the one right behind the engine and tender. It was not turned over, it settled on the body; the trucks just went down, buried in the ground. My duties between stations are entirely within the car. I am pretty well engaged all the time, so that I don't have much time to observe conditions along the line of road; and, therefore, I had never even noticed this negro church down there. I am not familiar with the location of the switches and things of that sort. I knew nothing about the condition of the track, and things of that kind; my duties are altogether inside of the car; and when my car left the track and went off, my freight and baggage just began to slide all over that car.

I was injured to some extent myself; just slight bruises; and my duties required me, of course, to stay there and guard and protect that property. I came over to Atlanta on 26; I had to stay there—I had some money and stuff like that, and I couldn't leave the car. My duties required me to stay right there with the property that was in my charge until I was relieved so that I could get away.

CHARLEY LEE LOWE (colored), called as a witness in behalf of the defendant, first being duly sworn, testified as follows:

Direct examination:

I am 9 years old, will be 10 next September. I went to school four weeks before Christmas. I can't read or write much. I live down yonder in Lennie Dobb's house, right down below the Baptist church, that little colored Baptist church down there. That colored Baptist church stands pretty close to the railroad. I remember the day along about last February some time when the train turned over down there just below Bremen, between Bremen and that Baptist church. I was out there that day. On that day, before that train come up, I put a rock on there and was [fol. 113] standing there until it busted and I went on when it passed there. I put it right down in front of the Baptist church on top of the rail. After I put it up there I went out there in the road. The train ran over it and busted up the rock, then went on up the track. I didn't see nothing happen to it; I just saw it pass on up the track. I saw it after it turned over. I went on up there where it turned over afterward. Later on in the day Mr. Swint and the Sheriff and others came over to my house and talked to me. I went back to the Baptist church with them and showed them where I put that rock, and showed them where I got the rock. It was a red rock as big as your fist. It was a rock that looked something like that (indicating). It wasn't as big as that, it was half as big; it was as big as right across there (indicating with rock).

Cross-examination:

It was about as big as a man's fist. Nobody told me to say that; nobody has told me to say anything. It was

about half as big as that rock; if you burst that rock in two it was about half that size. It was a red rock. It looked more like that (indicating), more like the little rock. It was one of the kind of rocks that you could crush; and it was one of the kind of rocks that would make stuff like that (indicating). I never had put any more than that on there; that was the first time I had ever done it. I hadn't been putting them on there and seeing them crush, that was the first time I ever did that. I just put one rock on there, put it on top of the rail, set it up there. The rock wasn't as high as this rock, just half as big as that rock; it was not that high, but it was just one rock. The train was coming along and I put it on there. I heard the train coming. It was not in sight when I did it, it was not quite in sight. That rock (indicating), the one I put there, was a little bit bigger than that one; it was half as big as that one (indicating); it was a little bigger than [fol. 114] those two rocks put together; a little bigger than both those put together; about one more bigger than both of those; put one more of that size and it would be about as big as that; just about one more in there. Here is another one, about that big; just about that size there now, that was the rock I put on that track. I put it there to see the train mash it. After the train passed I did not go to see whether it was mashed or not; I seen it when I was out there in the road; I saw it enough out of the road without going to it. From there I went home. I saw the train run up the track near Bremen; but until it got way up there it ran all right. Up to the time it turned over at that switch, I did not see anything wrong with it. I saw some of the wheels off. I did not see the front trucks off; I saw two wheels off; they were the two wheels in front; I saw those two truck wheels off. From the place where I noticed the trucks were off or any wheels off, the engine ran, after it hit the rock, before the wheels got off, about as far as from here to the wall; after it hit the rock, before the wheels got off. I did not see them when they got off; I saw them when they were off. I was not looking at the train all the time; I was looking at the rock. I saw the train. It went as far as from me to the wall over there before I saw the wheels off the track. I don't know whether they got off before that or not, that was when I noticed them. I was looking at the train all the time; I looked at just one place,

the back of the train. These people got hold of me about 12 o'clock. This train passed there about 10. It was two hours after that before they got to where I was. I did not live a mile from there, it was a quarter of a mile; it was in sight of that place. I went home, and about 12 o'clock these policemen came and got me; they just come down there and told me. I run and they measured my track; I run and they caught me. Mr. White, and I forget [fol. 115] the other's names, got hold of me. The others were just others, I have forgotten their names; police I think; two policemen I think. They told me what they arrested me for; they said for putting that rock on the track. They told me that before I told them anything. They got me for putting that rock on the track. I hadn't told them up to that time; I hadn't told my ma and hadn't told my pa; and these men came and got me and said they got me for putting the rock on the track and that was the first anybody had said about it. I never said nothing; I said I put it on there. They took me to the calaboose and kept me there until night and then brought me to Buchanan. They kept me thirty days and then they turned me loose; and I have been loose ever since. I haven't been putting any more rocks on tracks; I haven't put any more on the track since then. The rock I put was about as big as this pile; and I put it on there to see the train crush it.

It was agreed between counsel for the plaintiff and counsel for the defendant that statement of M. E. MADDEN, a witness for the defendant, might be submitted as evidence just as though it had been taken as depositions. The statement is as follows, to-wit:

STATE OF ALABAMA,
County of Jefferson:

Statement of M. E. Madden

I am now General Superintendent of the Southern Railway Company, with headquarters at Birmingham, Alabama, and have been for the past five years. Prior to that time I had seven years active experience as locomotive engineer, during which time I ran an engine between Birm-

ingham and Atlanta, Georgia. After that service, I was then Road Foreman of Engines two years, and had con-
[fol. 116] trol over engineers and firemen operating over various lines. After that service, I became Trainmaster for the Southern Railway Company at Selma, Alabama, and Macon, Georgia, serving in that capacity approximately twelve years. I then became Division Superintendent, with headquarters at various places for a period of approximately ten years, and then became General Superintendent, as above stated.

On February 14, 1933, I was advised of the derailment of the engine and several cars on the Southern Railway Company's lines, near Bremen, Georgia, in which derailment the engineer, James M. Cox, lost his life. Upon receipt of this information, I was at Birmingham, Alabama. and left for the scene of the accident, leaving there on Train No. 26 and arrived there (scene of the accident) about three-thirty P. M., in the afternoon. I immediately made an inspection of the track and the derailed engine. especially inspecting the track at point of derailment immediately in front of a small church, which stood near the track. At that point I observed fragments of a rock which had been crushed; the fragments being on each side of the rail and at a point a few feet east thereof, and towards Bremen, Ga., were the first indentations of the wheel flange on the ties. These indentations I traced from that point to point of derailment.

At the point of derailment, as hereinabove referred to, it was on a six-degree curve to the left. The right-hand rail was super-elevated six inches above the other rail. I saw this measurement made by employees of the Southern Railway Company and by Inspector of the Interstate Commerce Commission. In my opinion, based upon my experience as a railroad engineer and long railroad experience as an operating officer charged with the responsibility for proper maintenance of track, this was a proper and sufficient elevation to carry a train of the character derailed at a speed of sixty miles or more per hour with safety.

[fol. 117] At point of derailment, the rails sat on tie-plates and these plates are spiked to the tie. These plates have two openings on each side of rail and there is one spike

driven into the tie on each side of the rail. The other openings in the tie-plate are there to be used in the event of any wearing of the other openings. This method of spiking is used on all lines of the Southern Railway Company and is amply sufficient to hold the rail securely and steadily to ties at point of derailment. I recall one incident where spikes were pulled on outside of a three-degree curve on the line of the Alabama Great Southern Railroad, and two fast passenger trains passed over this track and the rail did not move or spread in any way. At point of derailment, and on each side thereof for a considerable distance where I made a personal inspection thereof, the ties were sound and the spikes were securely driven into the ties up to the head and were holding firmly. There was no looseness or vibration in the rail at point of derailment. In other words, I found the track at point of derailment and all in its immediate vicinity where I made personal inspection in first-class condition and as good as at any point on the Southern Railway Company lines, or on any other railroad with which I am familiar.

In this connection, I might state that this particular piece of track where derailment occurred was rebuilt in 1931, and 100-lb. rail placed on it with first-class ties, tie-plates, spikes, etc., incident to its construction. In my opinion there was nothing in the conditions of the track at point of derailment which could possibly have caused or contributed to a derailment of the engine. The foregoing examination of the track conditions were made on the afternoon of the day of the derailment and no changes were made in the track, and the train which I went to Bremen on passed over [fol. 118] this piece of track, as did all other trains. This derailment caused no damage to the track at point of derailment, and made no repairs of any kind necessary at that point.

On the same afternoon of the derailment, and again on the next day, in company with Inspector of the Interstate Commerce Commission, I made an inspection of this engine. Several other gentlemen were present. The measurements of the flanges of the front wheels of the truck of this engine were taken by these gentlemen and by the Inspector of the Interstate Commerce Commission, and were found to conform to the standards prescribed by the Interstate Commerce Commission. The undersigned did not make these

measurements, and did not make any memorandum thereof. In the same way all of the wheels of the locomotive were measured and found to meet the requirements. I can say from my own observation that there were no sharp or worn or out-of-condition flanges in any respect.

I also, at the same time, and in company of the above referred to gentlemen, including the Inspector of the Interstate Commerce Commission, inspected the safety chains attached to the front trucks and found them to be partially twisted, which in my opinion showed evidence of having occurred in the derailment. I am satisfied this twisting occurred in the derailment because of a rupture of the outer scale of the metal, which was a fresh rupture. They were, however, of the proper length for use on this locomotive and on the track on which this engine was running. The purpose of these safety chains is to prevent the truck from running off the end of a tie in the event of a derailment. Had the chains been longer to permit this truck to go off the end of the tie, the engine would have been derailed instantly, and possibly the entire train behind it. If these chains had been as much or more than eight inches longer than they were, the purpose of these chains would have been [fol. 119] defeated. On a curve the truck wheels would have gone over to the right and have made a derailment of the entire engine almost a certainty. In fact, in the opinion of the undersigned, any additional length to these chains would have created a dangerous situation in case of a derailment.

On this engine, above referred to was an attachment known as Wright's Little Watchman, and is not a device required by the Interstate Commerce Commission. It does not come on new engines, but is brought by the Southern Railway Company on the outside and applied by it. This device is not used generally by other railroads, and, so far as the undersigned is advised, is not used other than on Southern Railway Company's engines. The use of this device cannot possibly endanger the operation of the train. It is used in the hope that it may apply the brakes and stop the train in event of derailment of front trucks. My experience with this device is that it sometimes works and sometimes will not work, and that it cannot be relied upon with any degree of certainty.

I am now and have for many years been familiar with

the Southern Railway Company's line of railroad between Birmingham, Alabama, and Atlanta, Georgia. Between point of derailment and Birmingham, Alabama, are numerous curves of the same or greater degree of curvature than at the point of derailment.

This statement is made for use in the trial of the case of Mrs. Olivia Cox Lunsford, Administratrix of the Estate of James M. Cox vs. Southern Railway Company, pending in the Superior Court of Haralson County, Georgia, this 14th day of January, 1934.

(Signed) M. E. Madden.

[fol. 120] Plaintiff introduced in evidence yearly statements stamped with the stamp of the Southern Railway Company for income tax return purposes, the same showing the yearly salary of the deceased to be as follows, to-wit: in 1928, $3610.50; in 1929, $3874.03; in 1930, $3887.73; in 1931, $3760.30; and in 1932, $3357.80.

It was agreed that the deceased's salary for 1933 was as follows, to-wit: January, first period, $163.96; January, second period, $102.60; and February 1st to day of his death, which was February 14th, 1933, $150.42.

Plaintiff introduced in evidence certified copy of temporary letters of administration, issued to the plaintiff, Mrs. Olivia Cox Lunsford, under date of March 29th, 1933, by Thomas H. Jeffries, Ordinary of Fulton County, Georgia, showing the plaintiff, Mrs. Olivia Cox Lunsford, to be the duly appointed Temporary Administratrix of the Estate of James Monroe Cox, Deceased.

Plaintiff introduced in evidence plat showing the tracks, etc., at the scene of the derailment, the same being attached to this brief of evidence as Exhibit "A", and made a part hereof.

Plaintiff introduced in evidence seventeen (17) pictures, as identified and testified to by the various witnesses, the same being attached to this brief of evidence as Exhibit "B", "C", "D", "E", "F", "G", "H", "I", "J", "K", "M", "N", "O", "P", "Q", and "R", and made a part hereof.

Plaintiff introduced in evidence the Carlisle Mortality Tables, contained in the 70th Georgia Reports, page 845, showing the life expectancy of the deceased to be 14.92 years, the evidence showing that he was 59 years of age at the time of his death.

[fol. 121] Plaintiff introduced in evidence the drawing of Wright's Little Watchman, the same being attached to this brief of evidence as Exhibit "S", and made a part hereof, together with a drawing of the trip bracket referred to, which said drawing is attached to this brief of evidence as Exhibit "S-A", and made a part hereof.

Plaintiff also introduced in evidence drawing of the track at the scene of the derailment, as drawn, identified and testified to by the witness, W. A. Goree, the same being attached to this brief of evidence as Exhibit "T", and made a part hereof.

Plaintiff also introduced in evidence drawing drawn by the witness, C. G. Goff, and identified and testified to by him, the same being attached to this brief of evidence as Exhibit "U", and made a part hereof.

No. 10

EXHIBIT "A"

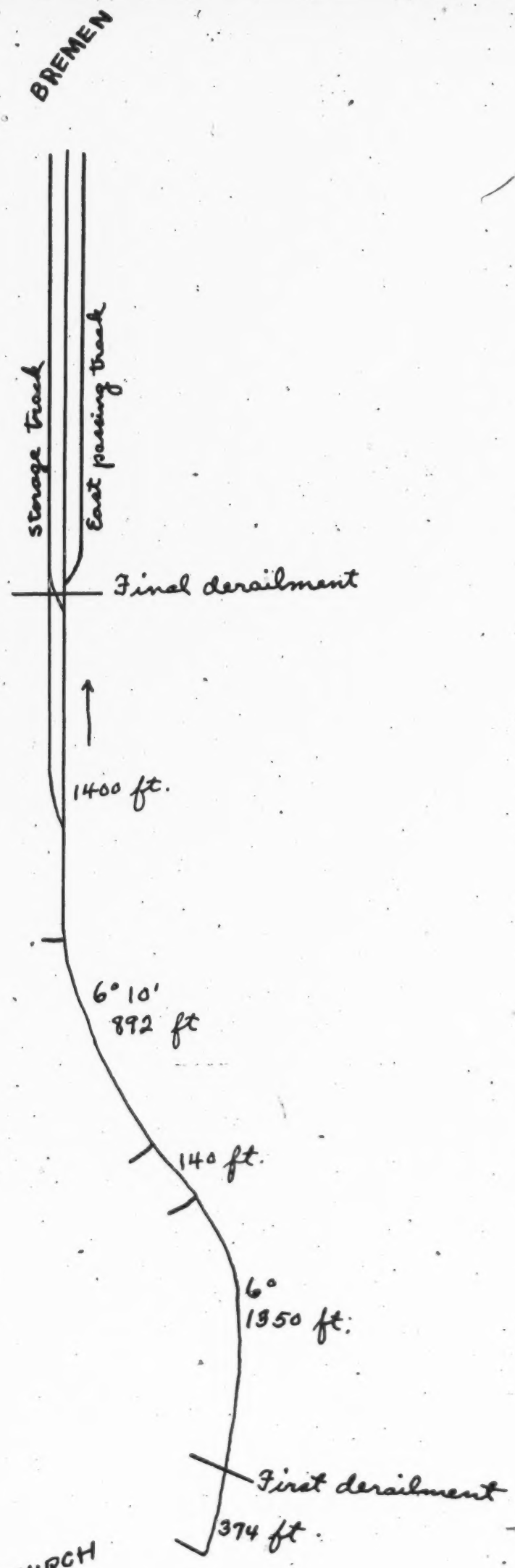


Exhibit "B"

This picture was taken 10 rail lengths west of the point of derailment looking east towards the point of derailment.

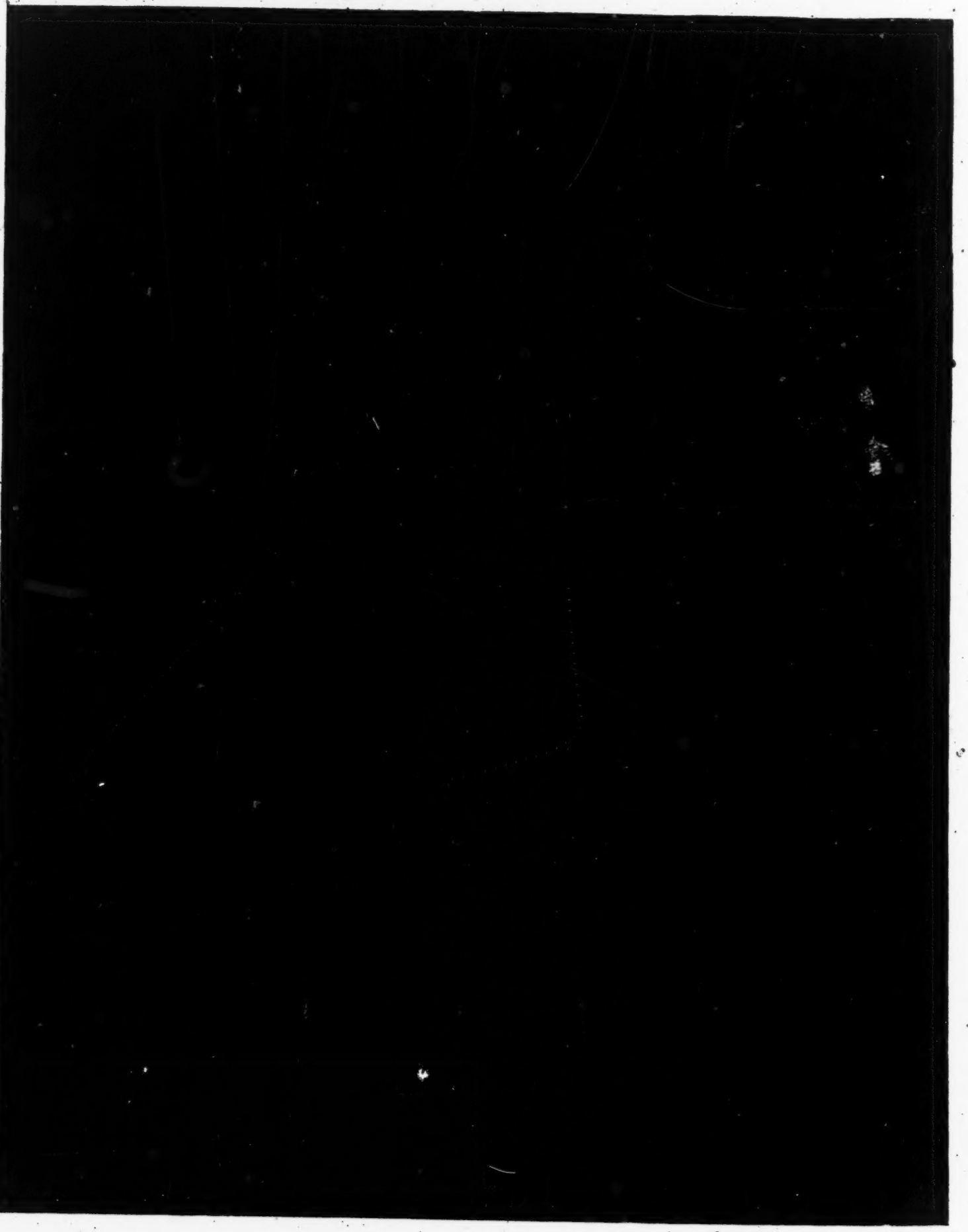


Exhibit "C"

This picture was taken 14 rail lengths west of the point of derailment looking east towards the point of derailment.

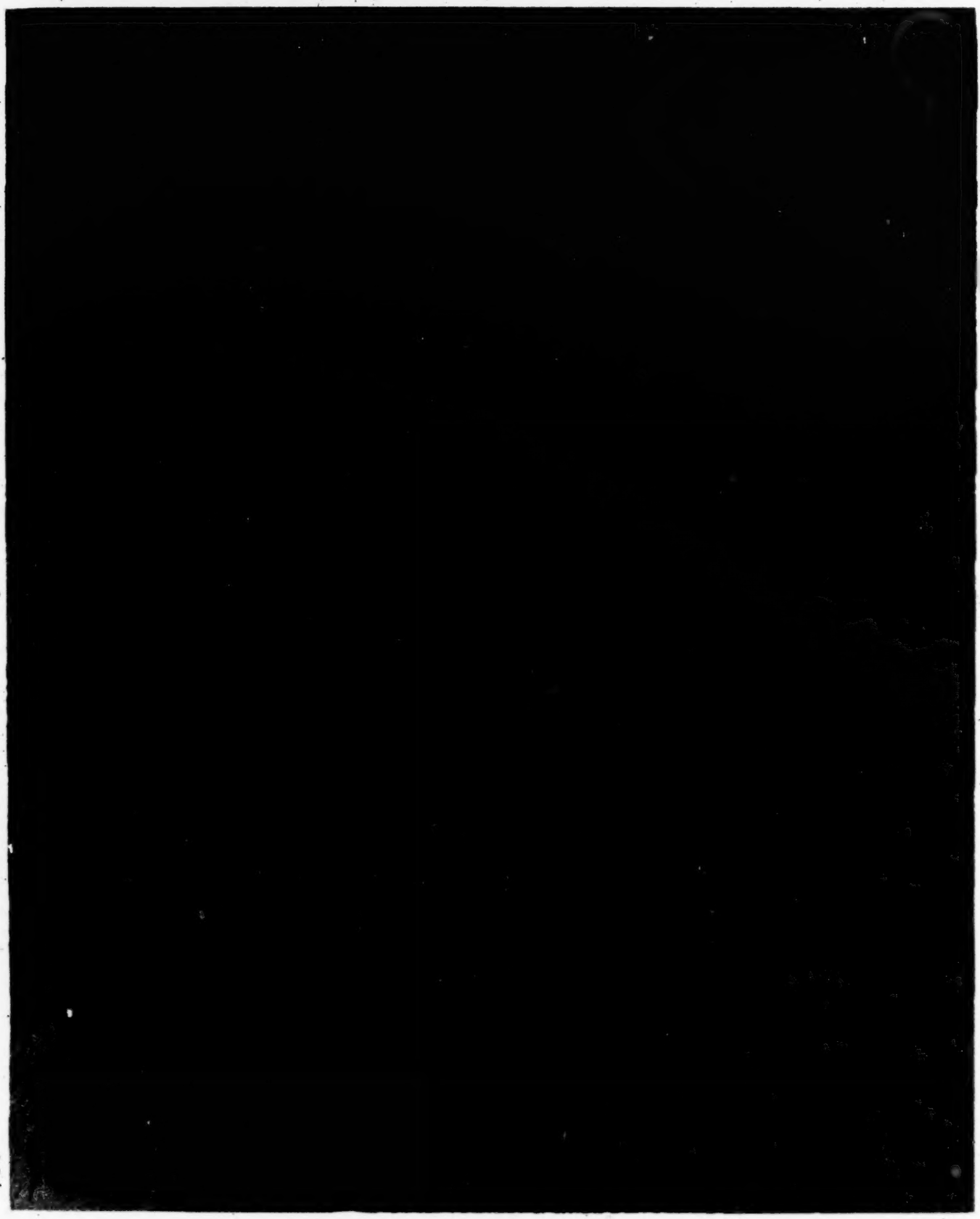
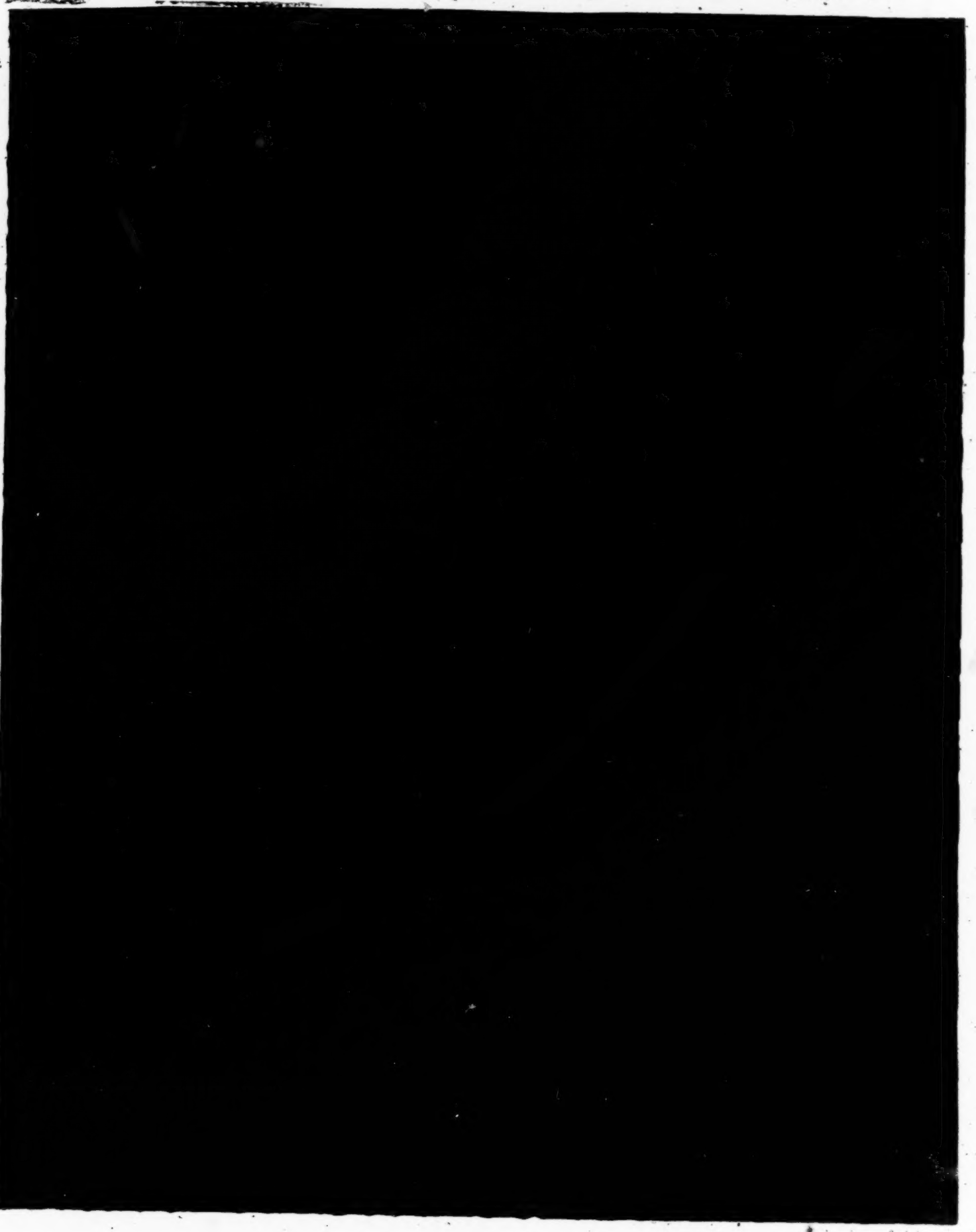


Exhibit "D"

This picture was taken about 15 feet west of the point of derailment just opposite the cemetery, the camera being 25 feet from Lunsford. This picture is to show the point of derailment, the ties there, the elevation of the outside rails, the marks of the derailed wheels on the ties.

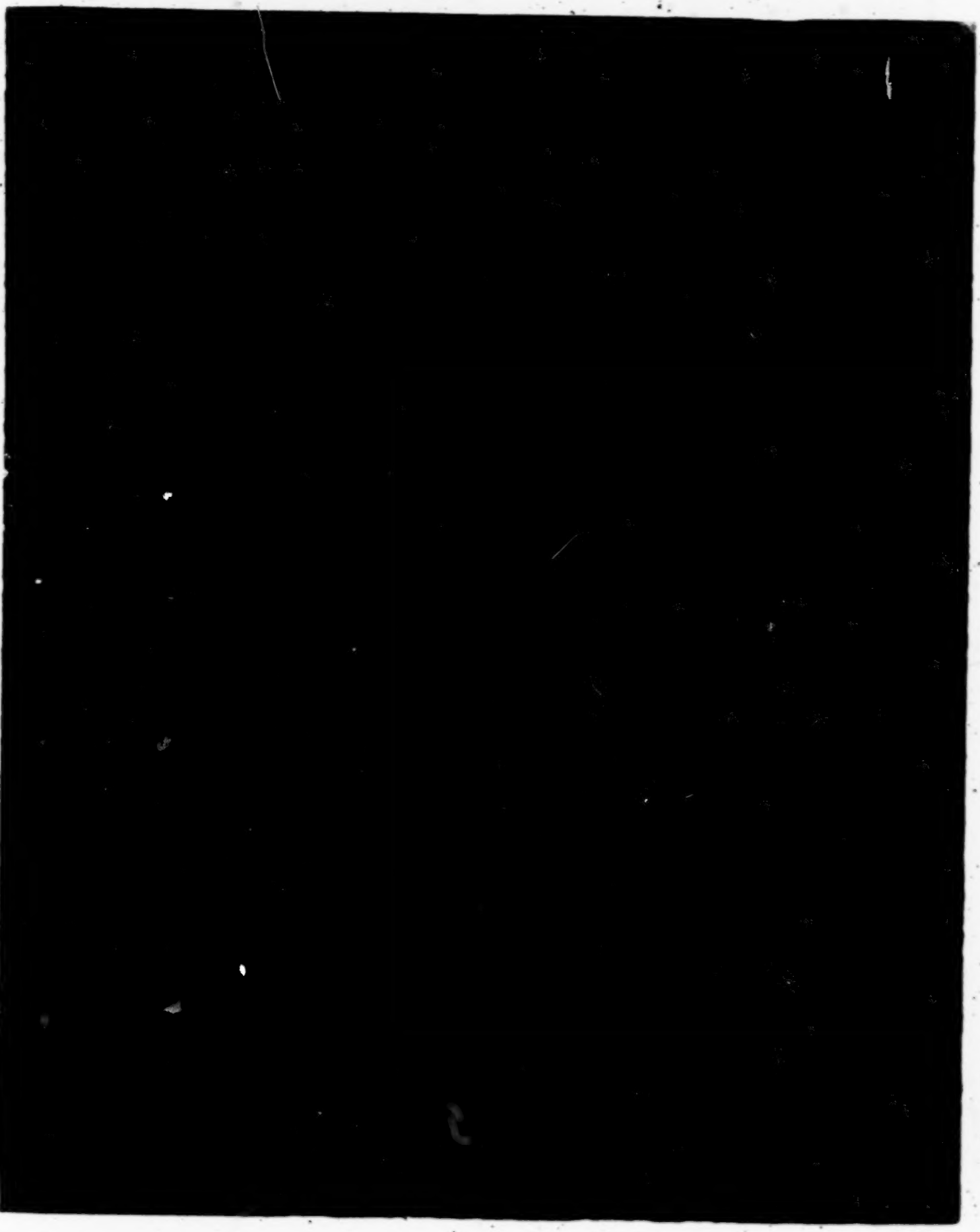


125

102

Exhibit "E"

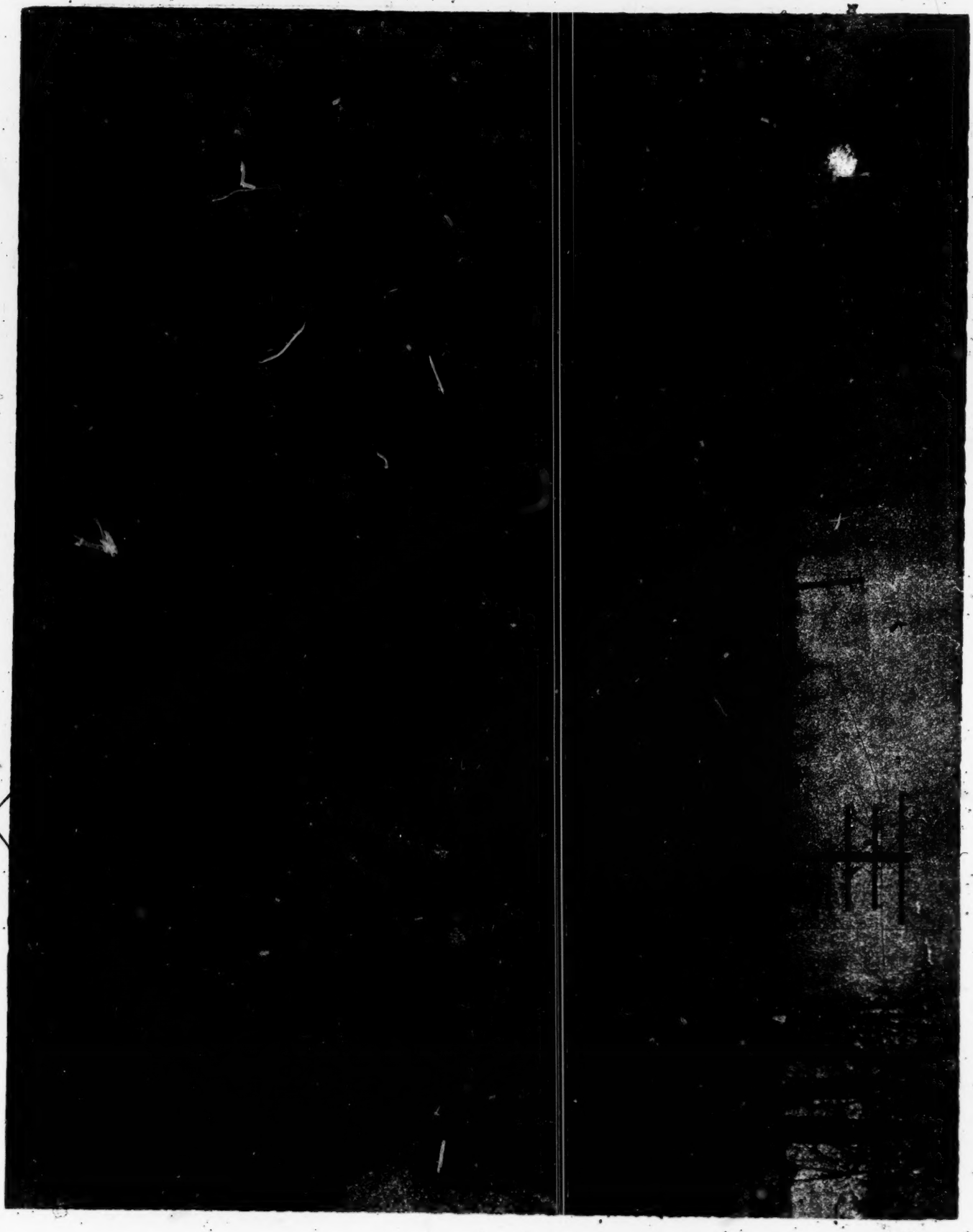
This picture is a close-up of the ties at the point of derailment. The camera was about 10 feet south of the south rail and the picture is intended to show 3 or 4 ties just west of the first wheel mark on the ties and to show the ties where the wheels left the track. The camera was on the south side of the track and the picture was taken looking north toward the graveyard.



126

Exhibit "F"

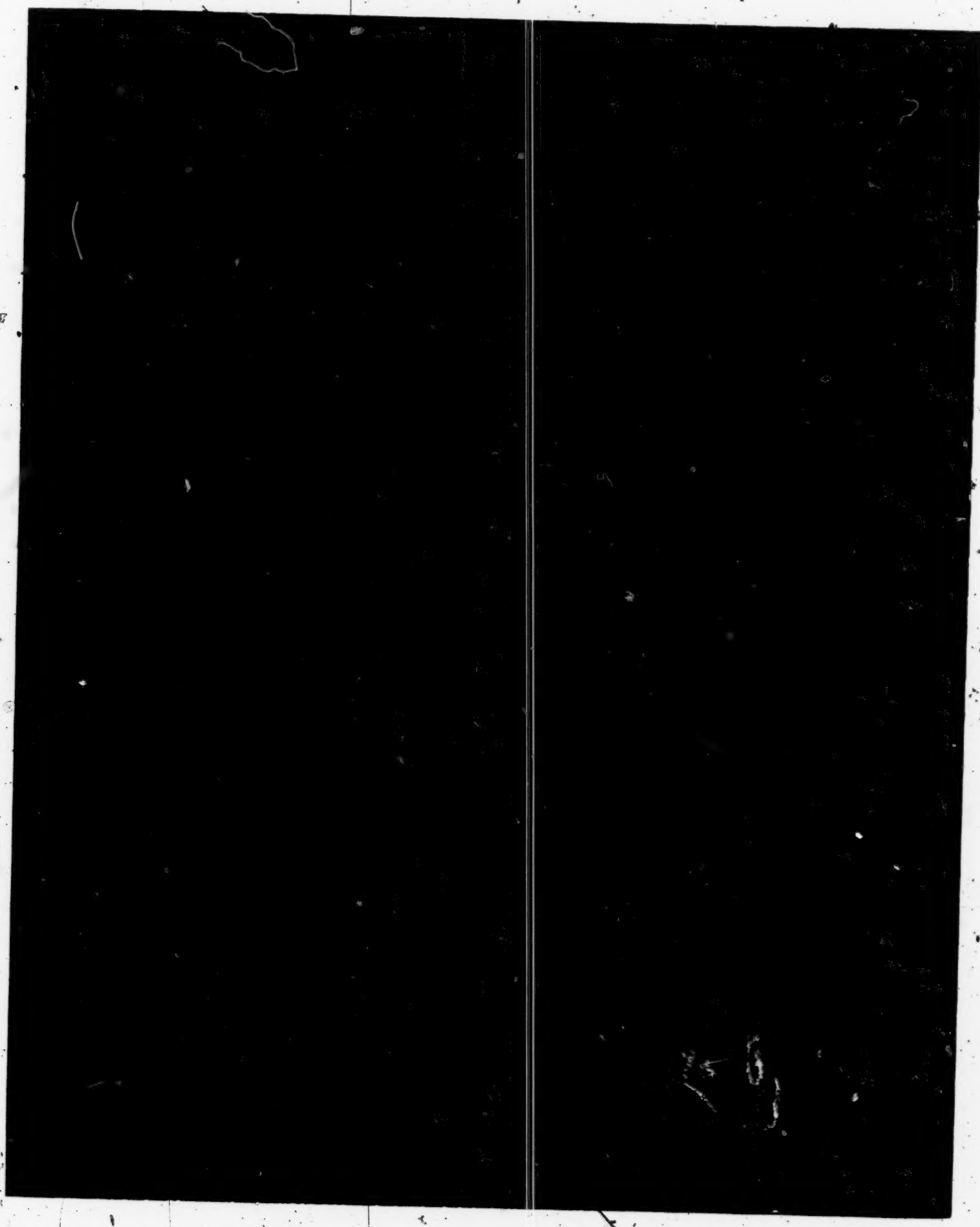
This picture was taken from a point about 20 feet east of the point of derailment looking west to show in the immediate foreground the wheel marks on the ties and to show as a whole the curvature of the tracks at this point.



127

Exhibit "G"

This picture was taken from a point about 30 feet east of the point of derailment and 15 feet looking east to show the nature and curvature of the track over which the train passed while the front trucks were off the track.



128

Exhibit "H"

This picture was taken from a point about 30 feet west of the right switch at which the engine began turning over looking east toward Bremen.

129

Exhibit "I"

This picture was taken from a point about 30 feet west of the point of the right switch and 10 feet south of the south rail looking north to show ties just west of the point of the right switch and about at the place where all the wheels left the track and the engine began to turn over.

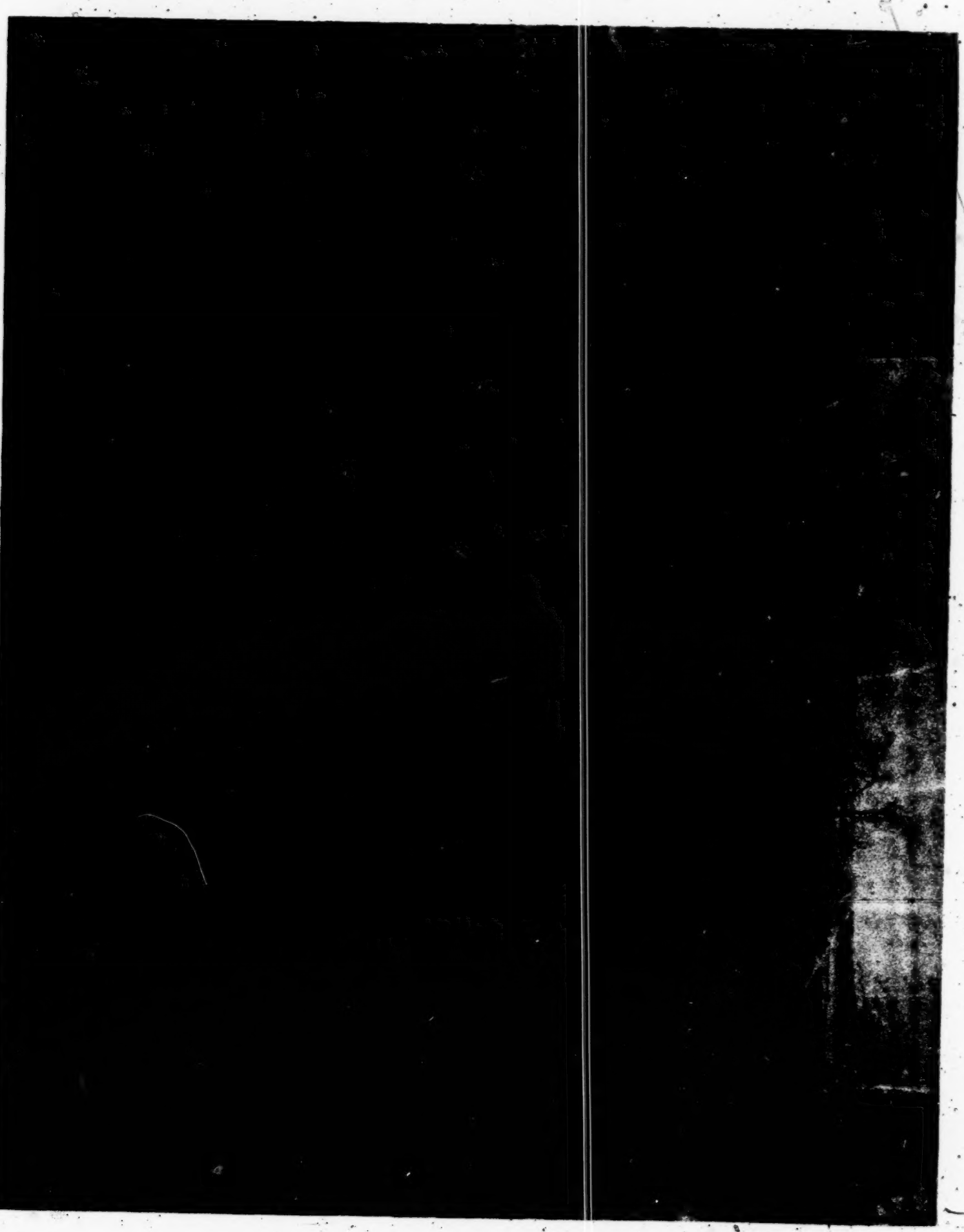


Exhibit "J"

Exhibit "K"

Close-up of watchman from left front side of green engine Atlanta division No. 1407 taken in North Avenue round house Southern Road January 9, 1934.

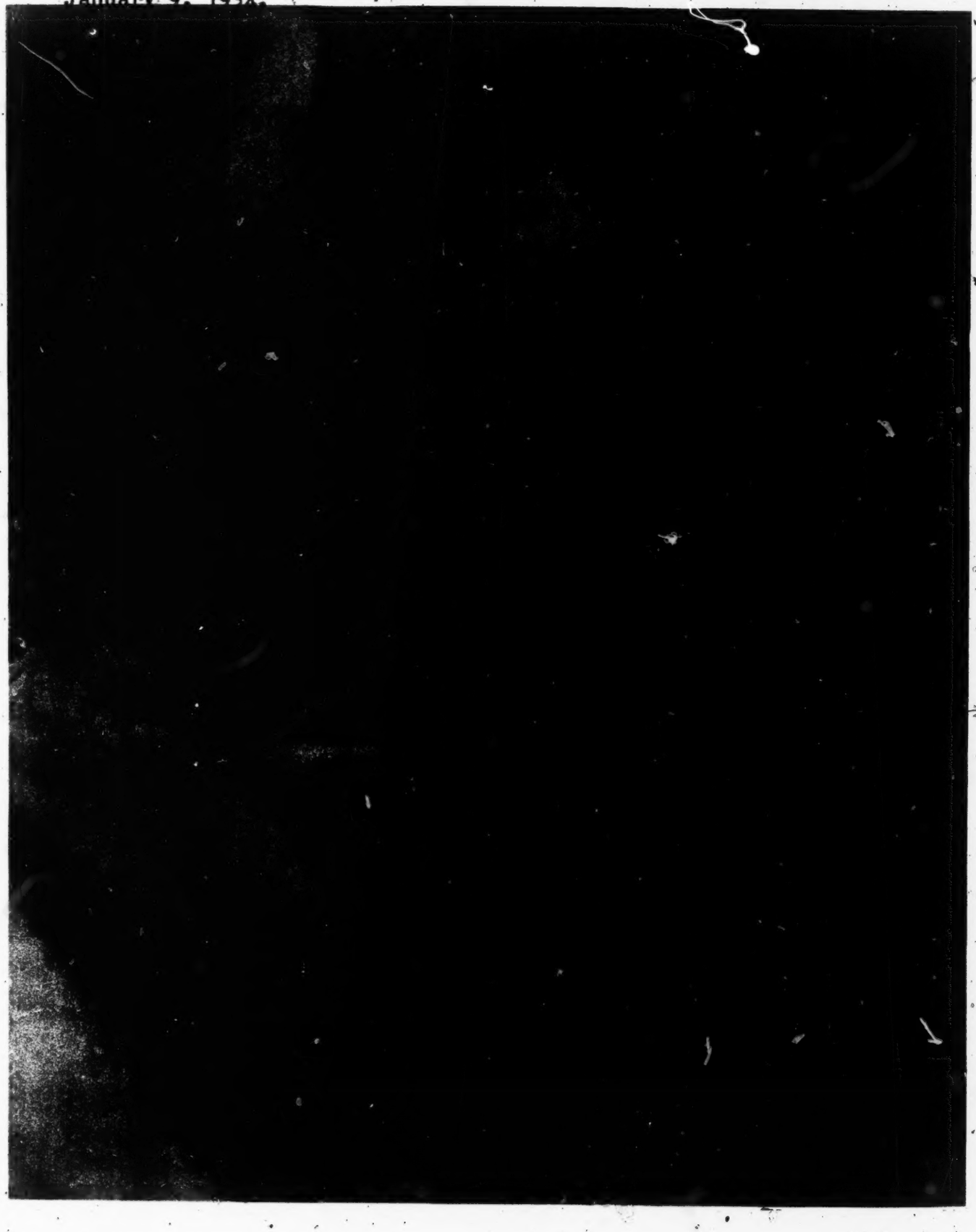


Exhibit "L"

Left front side of green engine Atlanta division No. 1407.

Exhibit "M"

Taken about 10 feet from left front side of green engine Atlanta division No. 1407.

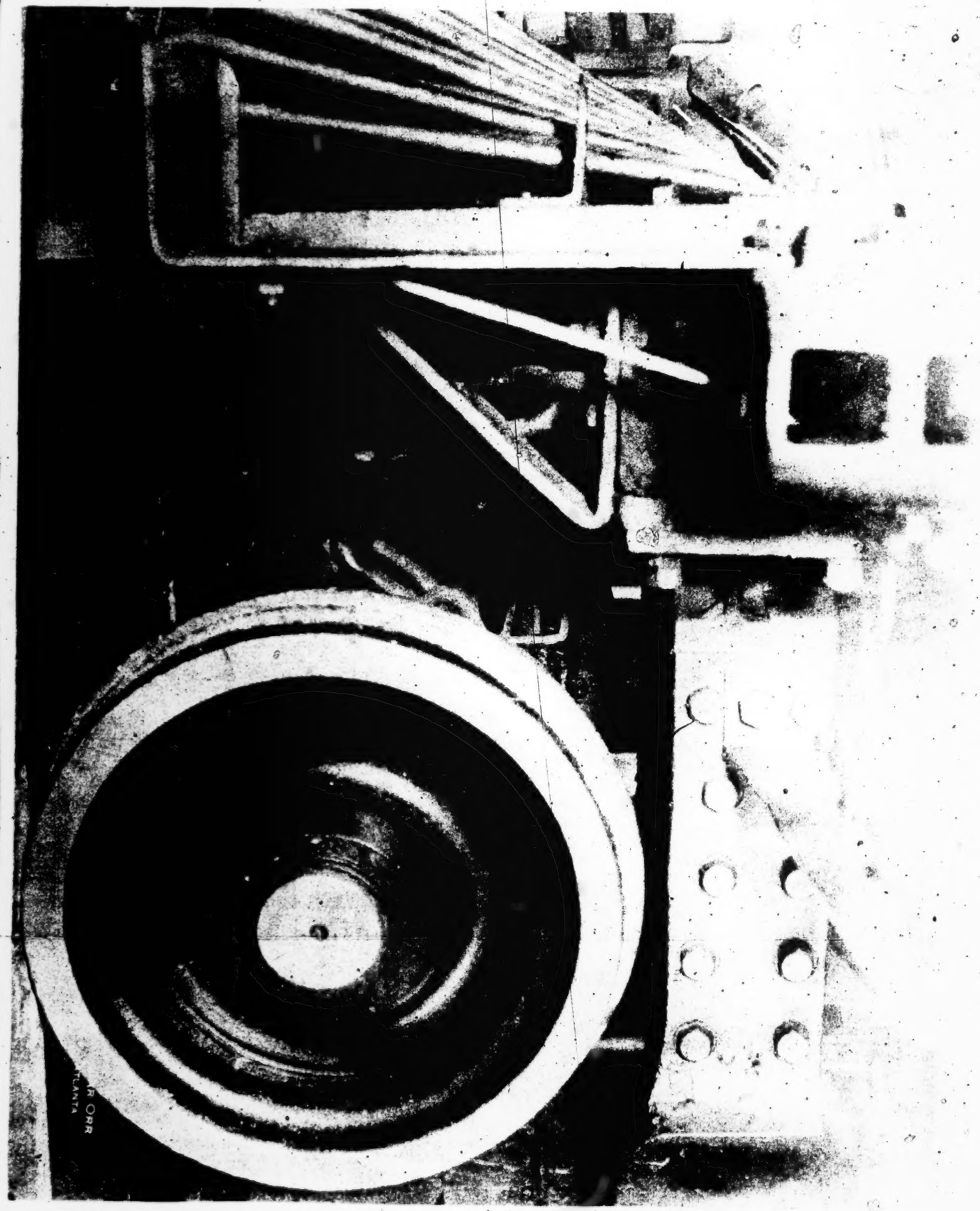
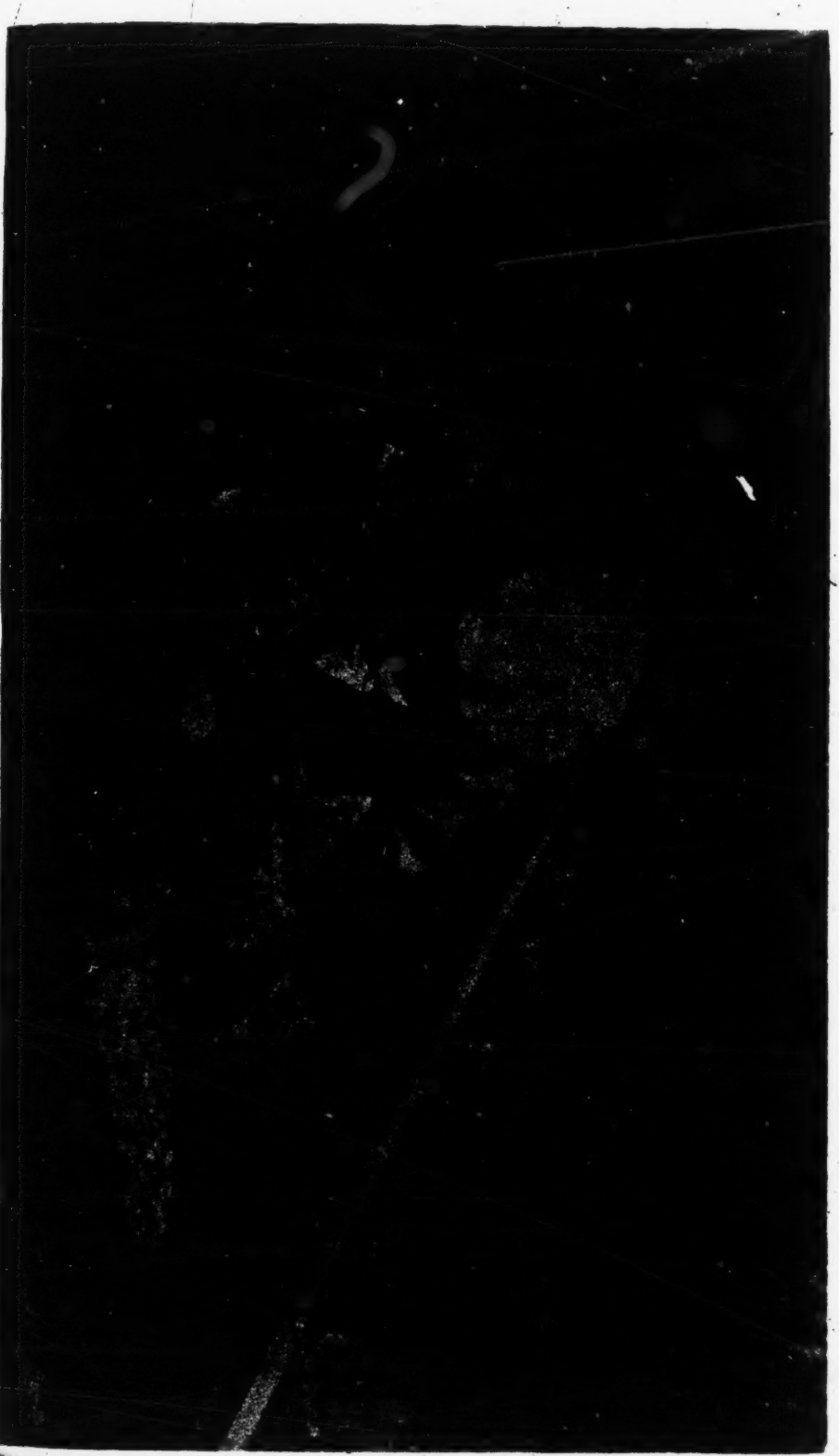


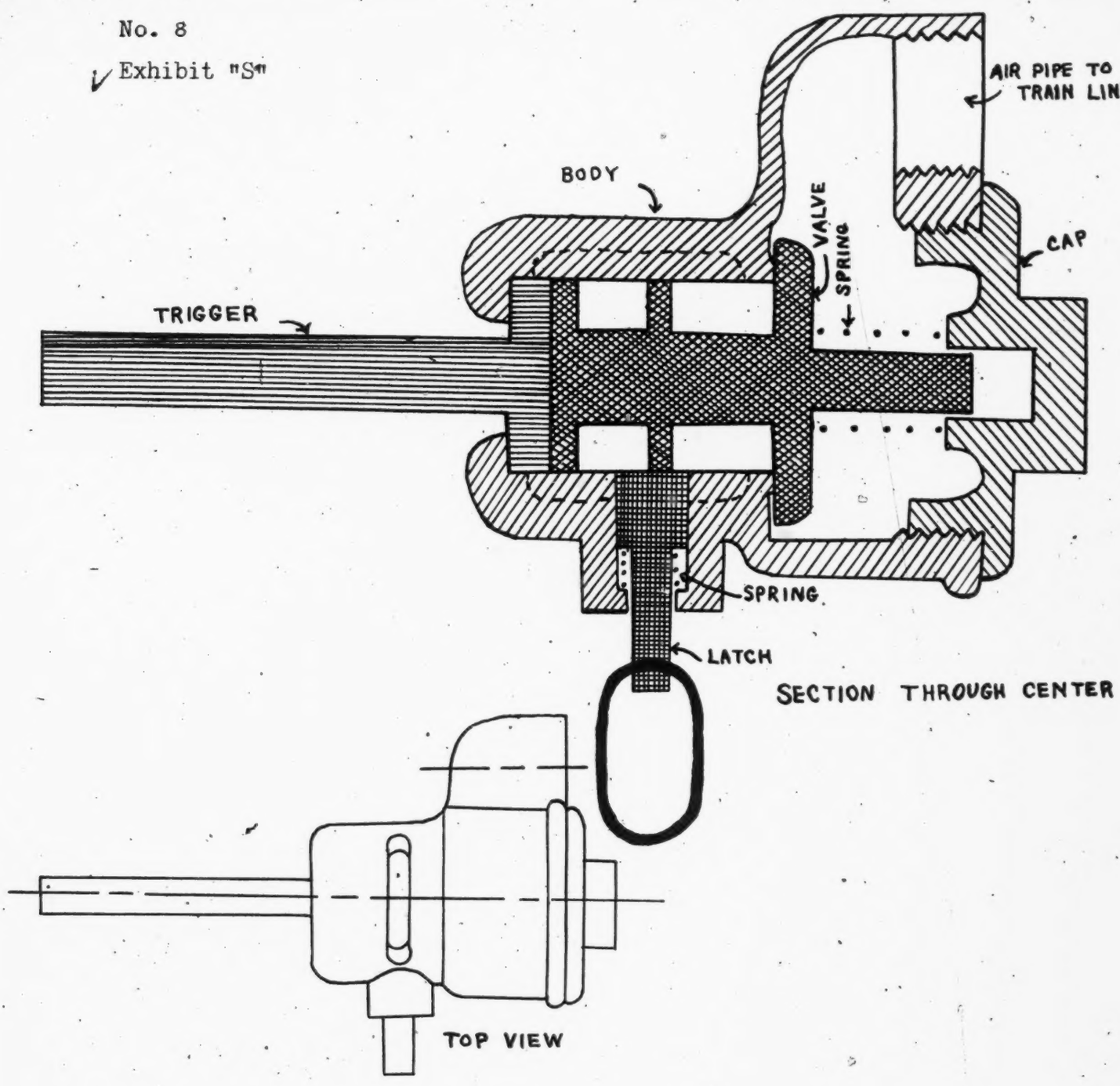
Exhibit "N"

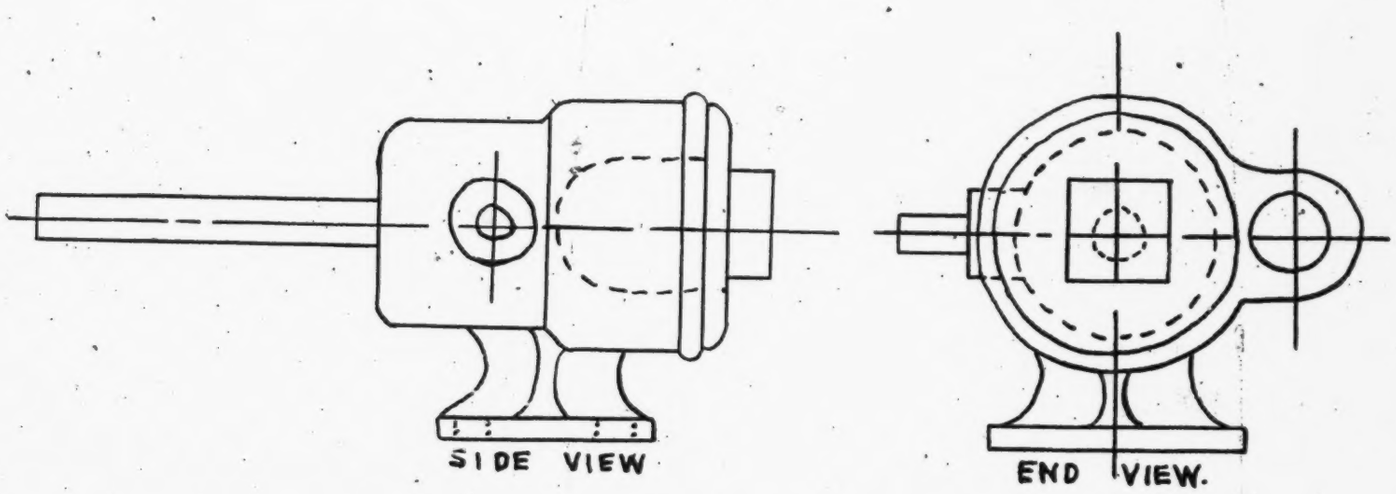
Taken about 10 feet from right front side of green engine No. 1263 Atlanta division.



No. 8

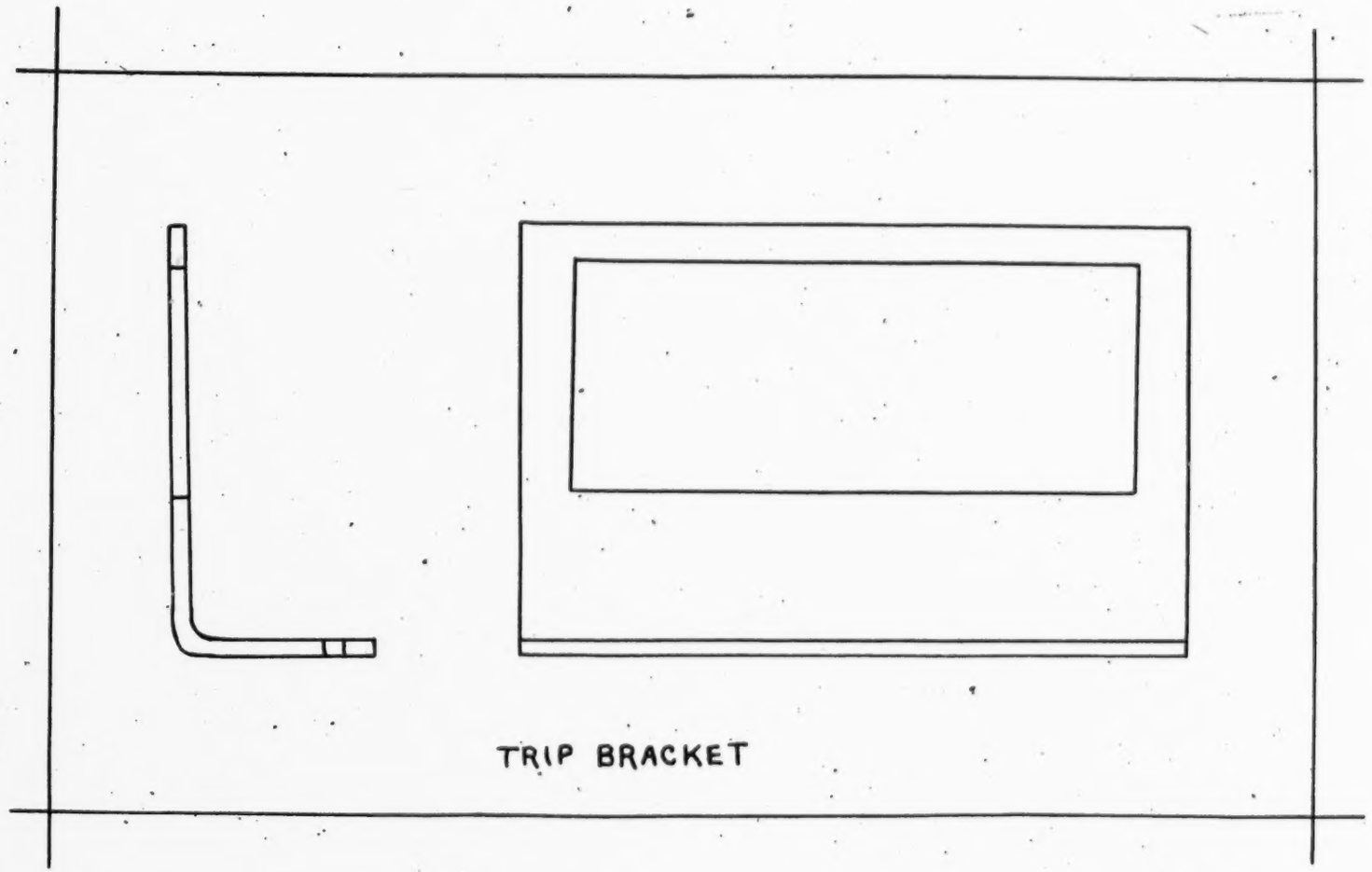
Exhibit "S"





WRIGHT'S LITTLE WATCHMAN.

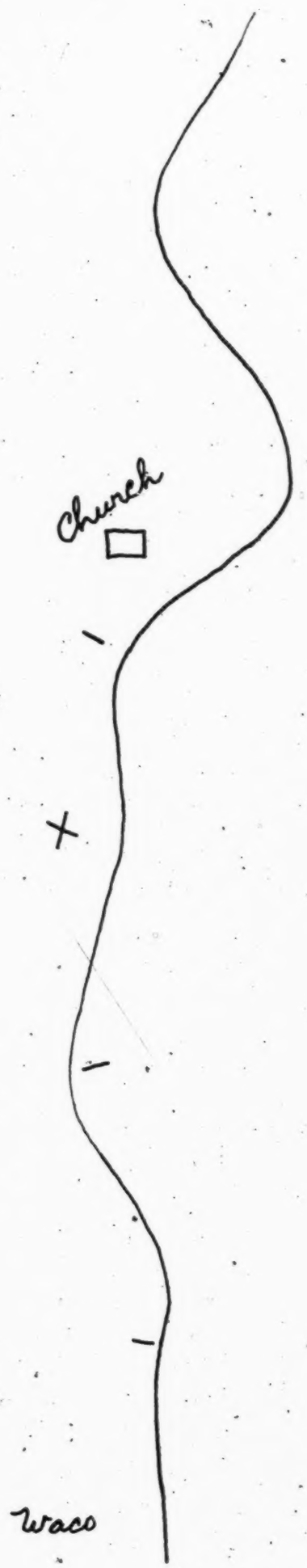
No. 9 Exhibit "S-A"



No. 11

Goree

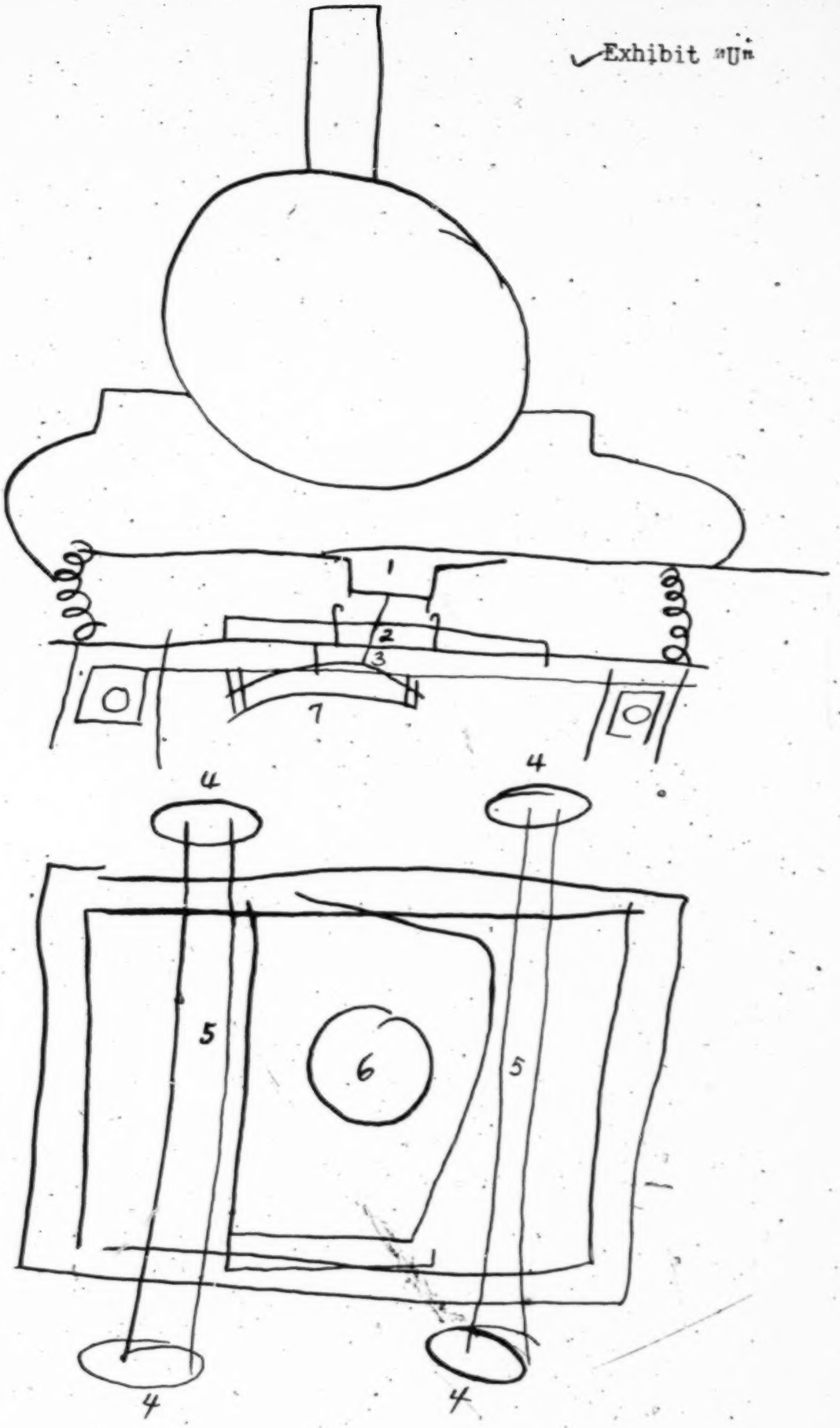
✓ Exhibit "T"



142

A

Exhibit "U"



143

[fol. 144] IN SUPERIOR COURT OF HARALSON COUNTY

ORDER APPROVING BRIEF OF EVIDENCE

I hereby certify that the above and foregoing constitutes a true and correct brief of the evidence delivered on the trial of the above stated case, to wit: Mrs. Olivia Cox Lunsford, Administratrix of the Estate of James Monroe Cox, Deceased, vs. Southern Railway Company, No. 2229, July Term, 1933, Haralson Superior Court, and the same is hereby approved as such and ordered filed as a part of the record in said case.

This the 5 day of April, 1934.

J. R. Hutcheson, Judge Superior Court of Haralson County, Georgia.

[File endorsement omitted.]

[fol. 145] IN SUPERIOR COURT OF HARALSON COUNTY

AMENDED MOTION FOR NEW TRIAL—Filed April 5, 1934

Now comes Southern Railway Company, defendant in the above stated case, and, by leave of court, amends its motion for new trial heretofore filed in said case, and, for grounds thereof, says:

1st. That on the trial of said case and in his charge to the jury therein, the trial judge, in presenting the contentions of the plaintiff in the first count of the petition, made the following statement, to-wit:

"The petition further alleges that the engine was equipped with what is called a watchman, which was an apparatus consisting of pipes, iron or steel contrivances and other apparatus under the body of said engine, extending from the back to the front thereof and consisting of cylinders, valves and other apparatus, including air, and which automatically, whenever said front wheels of said engine should leave the track, was designed, by means of a valve which was tripped by the derailment of said wheels, to apply the air on the brakes of the entire train.

It is alleged that had said appliance known as a watchman been in repair, the movement of said train at said point would have been stopped in a couple of hundred yards, which would have been automatic and without any effort on the part of the engineer; that the defendant failed, before said engine left Birmingham, Alabama to properly inspect said watchman to see that the same was in condition to work; that the said watchman was not in working [fol. 146] or functioning order at the time of said derailment; that the same failed to apply the brakes as was its design and purpose and as it would have done had the defendant exercised its duty of inspection; that had said watchman functioned, the train would have been stopped long before striking said right hand switch and the decedent's life would have been saved;"

and, further on, in stating to the jury the contentions of the plaintiff as set forth forth in the second count of the petition, made the following statement, to-wit:

"Then follows an allegation similar to that in the first count as to the engine being equipped with what is called a watchman, which, it is alleged, if it had functioned, would have stopped the engine long before striking the right hand switch and thus saved the life of the decedent;"

and, subsequent thereto, in outlining the contentions of the defendant as made in its answer to the petition, made the following statement, to-wit:

"Answering paragraph fifteen of the first count, the defendant says that the engine was equipped with an experimental device known as 'Wright's Little Watchman,' which was attached to certain apparatus connected with said engine and which was so designed that under certain conditions the derailment of the front truck wheels would trip a valve and thereby apply the air on the brakes of the train; that the same was in good condition on said engine at the time, but apparently the proper conditions did not develop which would cause the tripping of said valve and the application of said brakes; that the same is merely an experimental device which will not operate at all times when said truck wheels leave the track but will operate only when conditions develop which will trip the same; that said device is not in use on all railroads and is not re-

quired to be used under the Safety Appliance Act of Con-
[fol. 147] gress or any regulations made in pursuance thereof, and that it was no part of the duty of the decedent to inspect the same. The defendant in answering paragraph ten of the second count makes the same answer as to the device known as the watchman as is made in response to paragraph fifteen of the first count;" and thereafter instructed the jury as follows, to-wit:

"The law under which this case is being tried is the Act of the United States Congress of 1908. So far as is applicable to this case, that act provides that every common carrier by railroad, while engaged in commerce between any of the several States of the Union, shall be liable in damages for the death of any employee in such commerce, such liability is to be to the employee's personal representative for the benefit of the surviving widow and children of such employee, such liability to be where death results, in whole or in part, from the negligence of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery or other equipment. This law further provides that in all actions brought against any such common carrier by railroad under any of the provisions of this Act to recover damages for the death of an employee, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. Provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee;"

and, subsequent thereto, further instructed the jury as follows, towit:

"I will now instruct you upon the allegation contained [fol. 148] in paragraph 15 of the first count and paragraph 10 of the second count, the substance of which is that there was upon the engine an appliance known as a 'watchman', which consisted of cylinders, valves and other apparatus, including air, and which was under the body of the engine and extended from the back to the front end

thereof, and which automatically, whenever the front wheels of the engine should leave the track, was designed, by means of a valve which was tripped by the derailment of the wheels, to apply the brakes on the entire train, and that had this appliance been in repair and had this appliance functioned, the train would have stopped long before striking the right hand switch and would have saved the life of the decedent. The allegation is that this contrivance was not in working or functioning order at the time of the derailment, that the same failed to apply the brakes as was its design and purpose, and that had the "watchman" functioned, the train would have stopped long before striking the right hand switch.

"The court charges the jury that under the Act of Congress in force at the time of the alleged derailment in this case and death of the decedent, it was provided as follows: 'It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender and all parts and appurtenances thereof, are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28, 29, 30 and 32 and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for.' You are further instructed that the law to which the court has called your attention applies to the locomotive, its boiler, tender and [fol. 149] all parts and appurtenances thereof, and the court charges the jury that a contrivance built on the engine and attached to certain apparatus connected to the engine, and which was so designed that under certain conditions the derailment of the front wheels would trip a valve and thereby apply the air on the brakes of the train, is a part and appurtenance of the engine or locomotive; provided, gentlemen, you find the following to be true:

"The defendant contends that the device known as Wright's Little Watchman is really in an experimental stage, that it was in use at the time as an experiment only, that it was not perfected, that it would work sometimes and at other times it would not, and that therefore

it was not used as a permanent part of the locomotive. I charge you on this question that if you find from the evidence, (and that is purely a question for you) that this device known as Wright's Little Watchman had not been in general use on this road, or on other roads, for a sufficient length of time to be a fixed and permanent and reliable device for the purpose for which it was used, and that its use, as contended, was simply an experiment, and this limited or experimental use was such that the decedent did not and was not authorized as a reasonably prudent man to rely on the working and operation of this device at this particular time, then in that event the failure of this device to work or to perform its functions would not be charged against the defendant as negligence, and the defendant would not be liable for a failure on the part of this device to operate properly.

"Now, on the other hand, I charge you that if this device, known as Wright's Little Watchman, had been in general use by the defendant, or by railroads in general, for such a length of time and in such general use that it became a fixed and permanent part of the locomotive, and that use was such as to hold out to the decedent, the engineer in this case, that it was a reliable device, that it could [fol. 150] be relied upon by him to function, and that any prudent man would have relied on this device under all the circumstances of the case, then the failure of this device to operate or to function, which failure was caused by and brought about by a failure to inspect the same and keep the same in proper working order, then and in that event such failure to operate or function would be negligence on the part of the defendant. If you find, gentlemen, that this device was used, as I say, so generally used for such length of time by the defendant that it became a part and appurtenance of the engine, and that the decedent was authorized to rely on it at this particular time by the conduct of the defendant in putting it on the engine and using it, under all the circumstances, then the following law would apply and this would be considered a part and appurtenance of the engine or locomotive at this particular time. I charge you that the duty put upon the defendant railway by the Act of Congress which the Court has called your attention to, to keep the locomotive and all parts and appurtenances thereof in proper condition and safe to oper-

ate in the service to which the same was put, is an obsolute duty on the railway. It is not subject to any limitation or condition, is positive and not dependent, and unqualified by any consideration whatever. Now, gentlemen, if the defendant at that particular time put this device there for the purpose for which it was intended, it was the duty of the railroad company at this time to see that it was in proper working order, whether it was in an experimental stage or not. Failure to inspect it and see that it was in proper working order would be negligence, provided of course that the derailment of the locomotive was brought about by failure to have the "little watchman" in proper working order. These are questions for you. All questions of fact are for you. If you believe from the testimony that the defendant failed to have the part and [fol. 151] appurtenance of its locomotive, known as the watchman, in proper condition and safe to operate in the service to which the same was put, and if the same did fail to function and operate, and if its failure to so operate, because it was not maintained in good condition, was the proximate cause of the death of Mr. Cox, then the plaintiff could recover in this case. Of course, the circumstances at the time should be such as to cause a reasonably prudent man and a reasonably cautious man to have relied upon the "little watchman." I mean to say that if the circumstances were such as to hold out to Mr. Cox that this contrivance was there and was in proper working order, and it was not, then of course if the death was caused by the failure of this contrivance to work, if that was the cause of it, then of course the railroad company would be liable, provided of course that they did not inspect it and put it in proper working order at that particular time.

"If the jury believe from the evidence that the initial or first derailment at a distance of 1.35 miles from the depot at Bremen occurred from some cause other than the railway company's negligence, such as the placing of a rock on the track, still, if you believe from the evidence that this engine was equipped with a part and an appurtenance known as a watchman, which was designed to trip a valve when the front trucks should become derailed, and if you believe that had it been in proper condition and safe to operate in the service to which the same was

put that it would have caused the valve to trip when the front trucks became derailed, and that had it functioned the train would have been stopped by applying the brakes before it finally became derailed, and if you believe that the failure of this watchman to properly operate was due to the fact that it was not in proper condition and safe to operate in the service to which it was put, and that if it had operated the train would have been stopped and [fol. 152] the decedent's life saved, then I charge you in that event the defendant would be liable in this case for damages to the plaintiff. This, gentlemen, is qualified under the charge I gave you a while ago on the question of whether or not the 'little watchman' had been in use so long and to such an extent by the railroad company that the engineer was authorized to expect it to operate and to rely upon its functioning, and was not simply put there as an experiment on this occasion and known to him as such or should have been known to any prudent man under all the circumstances.

"Now, gentlemen, the Employers Liability Act of 1908 provides that no employee who may be killed in the employment of a carrier engaged in interstate commerce, and who is himself engaged in such commerce, shall be held to have been guilty of contributory negligence in any case where the violation by the common carrier of any statute enacted for the safety of employees contributed to the death of such employees. Therefore, I charge you that if Mr. Cox met his death because of the defendant's violation of the Safety Appliance Act of Congress which I have read to you, then I charge you that the defendant railway can neither claim that Mr. Cox assumed the risk of the result of such violation, nor would any contributory negligence of Mr. Cox be treated to reduce the damage, if the violation by the railway of this statute contributed to his death.

"If you find under the instructions given you, either on the first branch of this case as to the issues of negligence on the part of the railway company and on the part of the decedent, or on the second branch of the case as to alleged liability for failure to comply with the Safety Appliance Act, then you would go no further in your deliberations, but you would return a verdict for the defendant. If on the other hand you find for the plaintiff, it would be

your duty to assess the damages. Of course, in consider- [fol. 153] ing the question of damages, the jury will consider the rule which the court has previously given as to the effect of the decedent's negligence, if any, upon the amount of recovery, all of which I have charged you fully upon. The charge upon the measure of damages relates to the full amount of damages which are recoverable in a case of this kind, and you will bear in mind, as just stated, any reductions in that amount under the instructions hereinbefore given you, if you apply them to the measure of damages."

To each and all of the aforesaid instructions, the defendant, Southern Railway Company, excepts and assigns error thereon, and says that the court erred in so instructing the jury for the following reasons, to-wit:

(a) That said instructions with reference to the Safety Appliance Act of Congress, and the amendments thereto, and any alleged violation thereof, were wholly inapplicable and inappropriate, in that as movant contends there was no evidence showing or tending to show a violation thereof.

(b) That said instructions, especially so far as the same related to the Boiler Inspection Act of Congress (U. S. Code Annotated, Title 45, Section 23), and with reference to what is referred to as the "watchman", or "Wright's Little Watchman", were wholly inappropriate, inapplicable and in no way pertinent under the evidence in the case, and the trial judge erred in admitting to the jury any issue with respect thereto, or arising thereunder, for the reasons:

(1) That there was no evidence, as movant contends, showing or tending to show any violation of said Act, or any of the amendments thereto.

(2) That the device referred to as the "watchman", or "Wright's Little Watchman", is not an appliance or appurtenance prescribed by said Safety Appliance Act of [fol. 154] Congress, or said Boiler inspection Act of Congress, or any of the amendments thereto; that there was no evidence, as movant contends, showing or tending to show that it was an appliance or appurtenance prescribed in the rules and regulations of the Interstate Commerce Commission, made and provided under and in pursuance of said

acts, but, on the contrary, the undisputed evidence was that it was not an appliance or appurtenance prescribed for an engine under such rules and regulations of the Interstate Commerce Commission.

(3) That the undisputed evidence, as movant contends, showed that the use of the appliance or appurtenance known as the "watchman", or "Wright's Little Watchman", in no way imperiled the safety of the train or any person or employee thereon.

(4) That there was no evidence, as movant contends, showing or tending to show that the device referred to as the "watchman", or "Wright's Little Watchman", was in common or general use on railroads in this country, but, on the contrary, tended to show that it was not in such general use on railroads, but was only in use on some of the locomotives of the Southern Railway Company; that the undisputed evidence shows that it was an unperfected device in a mere experimental stage of development, uncertain in its operations, and could not be relied upon to operate in all cases.

In support of the foregoing, we call attention to the undisputed testimony, as movant contends, of Mr. M. E. Madden, the General Superintendent of the Southern Ry. Co., who testified to thirty-six years of active railroad experience, including seven (7) years as a locomotive engineer, two (2) years as Road Foreman of Engines, twelve (12) years as Trainmaster, ten (10) years as Division Superintendent, and five (5) years as General Superintendent of [fol. 155] the Company, the pertinent portion of his testimony being (brief of evidence, page 51), as follows:

"On this engine, above referred to was an attachment known as Wright's Little Watchman, and is not a device required by the Interstate Commerce Commission. It does not come on new engines, but is bought by the Southern Railway Company on the outside and applied by it. This devise is not used generally by other railroads, and, so far as the undersigned is advised, is not used other than on Southern Railway Company's engines. The use of this device cannot possibly endanger the operation of the train. It is used in the hope that it may apply the brakes and stop the train in event of derailment of front trucks. My ex-

perience with this device is that it sometimes works and sometimes will not work, and that it cannot be relied upon with any degree of certainty."

Also to the undisputed testimony of Mr. G. C. Goff, as movant contends Master Mechanic of the Southern Railway Company at Birmingham, Alabama, beginning at the bottom of page 34 of the brief of evidence, and extending through pages 35, 36, 37, 38, 39 and 40 thereof, describing the device and testifying that it was a mere experimental device, and in particular to the portion of his cross examination as follows, to-wit (see brief of evidence, pages 41 and 42):

"This Wright's Little Watchman is just in an experimental stage. That experiment has been going on with engines on this division of the Southern Railway, within my knowledge, for five or six or seven years. As yet, it has never been demonstrated to be a perfect appliance in the operations; and its operation depends on the roadway conditions, the curvature of the track, the height of the track and everything of that kind; and you have to adjust the framework and the trigger in such a way that it will not block the wheels of the train in the practical operation [fol. 156] of the train; and to do that, you have to adjust it for the most extreme conditions that you have to meet in the operation of that engine; and I might say that we have had some delay to trains on account of this device setting; and that would then involve the necessity of increasing the size of the framework; and also we have had some trip brackets, we have had some of the trip brackets to set at different heights on the same class engine, in other words, we couldn't make them exactly the same thing, we have set them the same thing and had them to set the brakes in emergency on the line of road. This trip bracket is the same thing we have been referring to here as the framework of the part. It varies on different class engines; I know of one particular instance that we set the bracket the same distance as another engine of the same class, and it set the brakes in emergency on the line of road. We applied them ourselves, they have to be put on entirely. At times it wouldn't set using the same engine."

2nd. That on the trial of said case and in his charge to

the jury, the trial judge instructed the jury as follows, to-wit:

"The court charges the jury that under the Act of Congress in force at the time of the alleged derailment in this case and death of the decedent, it was provided as follows: 'It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender and all parts and appurtenances thereof, are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the actual service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28, 29, 30 and 32 and are able to withstand [fol. 157] such test or tests as may be prescribed in the rules and regulations hereinafter provided for.' You are further instructed that the law to which the court has called your attention applies to the locomotive, its boiler, tender and all parts and appurtenances thereof."

To said charge of the court, the defendant, Southern Railway Company, excepts and assigns error thereon and says that the court erred in so instructing the jury for the following reasons, to-wit:

(a) That as movant contends under the evidence in this case the provisions of said Act of Congress as therein referred to were wholly inapplicable and in no way pertinent, in that there was no evidence showing or tending to show any violation thereof, defendant insisting that the device referred to in the pleadings and evidence as the "watchman", or "Wright's Little Watchman", is not an appliance or appurtenance prescribed by said Act, or in the rules and regulations of the Interstate Commerce Commission, made and provided under and in pursuance thereof, but, on the contrary, the undisputed evidence was that it was not an appliance or appurtenance prescribed for a locomotive under such rules and regulations of the Interstate Commerce Commission, and further contending that while there was an averment in plaintiff's petition as amended to the effect that the safety chains were too short, there was no evidence whatever in support thereof.

(b) That said instructions were highly prejudicial and harmful to the defendant, in that under the evidence in the case as movant contends the verdict rendered in favor of the plaintiff must necessarily have been based upon this inapplicable, impertinent act of Congress, and the alleged violation thereof by reason of the use of the device referred to as the "watchman", or "Wright's Little Watchman".

[fol. 158] 3rd. That on the trial of said case and in his charge to the jury, the trial judge instructed the jury as follows, to-wit:

"Now, on the other hand, I charge you that if this device, known as Wright's Little Watchman, had been in general use by the defendant, or by railroads in general, for such a length of time and in such general use that it became a fixed and permanent part of the locomotive, and that use was such as to hold out to the decedent, the engineer in this case, that it was a reliable device, that it could be relied upon by him to function, and that any prudent man would have relied on this device under all the circumstances of the case, then the failure of this device to operate or to function, which failure was caused by and brought about by a failure to inspect the same and keep the same in proper working order, then and in that event such failure to operate or function would be negligence on the part of the defendant. If you find, gentlemen, that this device was used, as I say, so generally used for such length of time by the defendant that it became a part and appurtenance of the engine, and that the decedent was authorized to rely on it at this particular time by the conduct of the defendant in putting it on the engine and using it, under all the circumstances, then the following law would apply and this would be considered a part and appurtenance of the engine or locomotive at this particular time. I charge you that the duty put upon the defendant railway by the Act of Congress which the court has called your attention to, to keep the locomotive and all parts and appurtenances thereof in proper condition and safe to operate in the service to which the same are put, is an absolute duty on the railway. It is not subject to any limitation or condition, is positive and not dependent, and unqualified by any consideration whatever. Now, gentlemen, if the defendant at that particular [fol. 159] time put this device there for the purpose for

which it was intended, it was the duty of the railroad company at this time to see that it was in proper working order, whether it was in an experimental stage or not. Failure to inspect it and see that it was in proper working order would be negligence, provided of course that the derailment of the locomotive was brought about by failure to have the "little watchman" in proper working order."

To said charge of the court, the defendant Southern Railway Company, excepts and assigns error thereon, and says that the court erred in so instructing the jury for the following reasons, to-wit:

(a) That the provisions of the Act of Congress therein referred to, and said instructions applying the same to the use by defendant of the "watchman", or "Wright's Little Watchman", were wholly inapplicable and in no way pertinent under the evidence in the case, there being no evidence as movant contends showing or tending to show that it was an appliance or appurtenance prescribed under the rules and regulations of the Interstate Commerce Commission, under the Safety Appliance Act of Congress, or the Boiler Inspection Act of Congress, as referred to or prescribed in either of said Acts, or any of the amendments thereto.

(b) That under said Acts of Congress the failure of said watchman to operate would not be negligence as charged by the court, and no absolute duty devolved upon the defendant Railway Company to keep the same in proper condition and safe to operate in the service, under the evidence in the case, there being no evidence as movant contends that it was an appurtenance required by the Act of Congress referred to, or by any rule or regulation of the Interstate Commerce Commission, made under and in pursuance of the terms of said Act, and the undisputed evidence showing that it was not an appliance or appurtenance required by [fol. 160] such rules and regulations of the Interstate Commerce Commission.

(c) That the undisputed evidence as movant contends showed that the use of the appliance or appurtenance known as the watchman, or "Wright's Little Watchman" in no way imperiled the safety of the train or any person or employee thereon.

(d) That said charge of the court was not adjusted to and was wholly inapplicable under the evidence in the case, except as the same might be applied under the Safety Appliance Act of Congress, or the Boiler Inspection Act of Congress, there being no evidence as movant contends of any defect or insufficiency in the appliance known and referred to as the "watchman", or "Wright's Little Watchman", and the undisputed evidence being that it was a device not in general use on railroads, that it was an unperfected device in a mere experimental stage of development, uncertain in its operations, and not to be relied upon to operate in all cases.

4th. That on the trial of said case and in his charge to the jury, the trial judge instructed the jury as follows, to-wit:

"If the jury believe from the evidence that the initial or first derailment at a distance of 1.35 miles from the depot at Bremen occurred from some cause other than the railway company's negligence, such as the placing of a rock on the track, still, if you believe from the evidence that this engine was equipped with a part and an appurtenance known as a watchman, which was designed to trip a valve when the front trucks should become derailed, and if you believe that had it been in proper condition and safe to operate in the service to which the same was put that it would have caused the valve to trip when the front trucks became derailed, and that had it functioned the train would have been stopped [fol. 161] by applying the brakes before it finally became derailed, and if you believe that the failure of this watchman to properly operate was due to the fact that it was not in proper condition and safe to operate in the service to which it was put, and that if it had operated the train would have been stopped and the decedent's life saved, then I charge you in that event the defendant would be liable in this case for damages to the plaintiff. This, gentlemen, is qualified under the charge I gave you a while ago on the question of whether or not the 'Little Watchman' had been in use so long and to such an extent by the railroad company that the engineer was authorized to expect it to operate and to rely upon its functioning, and was not simply put there as an experiment on this occasion and known to

him as such or should have been known to any prudent man under all the circumstances."

To said charge of the court, the defendant, Southern Railway Company, excepts and assigns error thereon, and says that the court erred in so instructing the jury, on the grounds:

(a) That said charge of the court was an application of the terms of the Boiler Inspection Act of Congress to this particular case, the defendant insisting that under the evidence the provisions of that Act were wholly inapplicable and in no way pertinent, the undisputed evidence showing that the watchman as therein referred to was not an appliance or appurtenance required under the rules and regulations of the Interstate Commerce Commission, made in pursuance and to carry into effect the provisions of the Safety Appliance Act of Congress, or the Boiler Inspection Act of Congress, or required under the terms of either of those Acts of Congress, or any of the amendments thereto.

(b) That said charge of the court was not adjusted to and was wholly inapplicable under the evidence in the case, except as the same might be applied under the Safety Ap- [fol. 162] pliance Act of Congress or the Boiler Inspection Act of Congress, there being no evidence as movant contends of any defect or insufficiency in the appliance known and referred to as the "watchman", or "Wright's Little Watchman", and the undisputed evidence being that it was a device not in general use on railroads, that it was an unperfected device in a mere experimental stage of development, uncertain in its operations, and not to be relied upon to operate in all cases.

Wherefore, the premises considered, movant, Southern Railway Company, prays that it be granted a new trial in said case.

Griffith & Matthews, Maddox, Matthews & Owens,
Attorneys for Movant, Southern Railway Company.

The above and foregoing amended motion for new trial in the above stated case, to-wit: Mrs. Olivia Cox Lunsford, Administratrix of Estate of James Monroe Cox v. Southern

Railway Company, is hereby allowed and ordered filed as a part of the record in said case, and the recitals of fact therein contained are certified to be true and correct.

This the 5th day of April, 1934.

J. R. Hutcheson, Judge of the Superior Court of Haralson County, Georgia.

[File endorsement omitted.]

[fol. 163] In Superior Court of Haralson County

Order of Court Overruling Motion for New Trial as Amended

Upon consideration of the within and foregoing motion for new trial it is ordered that the same be overruled upon each and every ground contained in original and amended motion for new trial, and a new trial denied.

This April 5, 1934.

J. R. Hutcheson, Judge S. C. T. C.

[fol. 164] In Superior Court of Haralson County

Charge of the Court—Filed April 5, 1934

Gentlemen of the jury, this is a suit brought by Mrs. Olivia Cox Lunsford as administratrix of the estate of James Monroe Cox, deceased, against the Southern Railway Company.

The suit is brought in two counts. In the first count it is alleged that on February 14, 1933, the decedent, James Monroe Cox, who will be hereinafter called the decedent, was employed by the defendant, the Southern Railway, as engineer on a passenger train. She alleges that on that day the decedent was driving a passenger train of the defendant from Birmingham, Alabama, to Atlanta, Georgia, and that the railway company and the deceased were both engaged in interstate commerce; that at about 10:30 o'clock in the morning, while decedent was so driving the engine, at a point approximately one and thirty-five hundredths of a mile west of Bremen, Georgia, in Haralson County, and

while rounding a sharp curve, the wheels of the front trucks under the engine left the rails but the engine, including all the drivers and other wheels thereof, remained on the track; that the engine continued to function apparently normally to the engineer and fireman, the front trucks being entirely out of view of them and there being nothing to put them on notice that they had left the rails, the construction of the engine being such by means of chains which suspended the trucks from the body of the engine, and other appliances, that the front trucks could be off the rails and the engine still continue to function without putting the engineer and fireman on notice that they were off the rails; that after the wheels of the trucks under the front end of the engine left the rails, the engine continued to run apparently normally, pulling the train a distance of seven-tenths of a mile until it reached a switch going to the right from the main line, at which point the said trucks with the front wheels attached thereto being off the track and dan- [fol. 165] gling by means of said chains and other appliances from the front end of the engine, struck said switch; that the effect of striking the switch was to throw the trucks and wheels to one side and under the engine and obstruct their further progress along the track and to cause the engine as a whole to leave the rails and to become unbalanced; that after running about one hundred yards in this condition the engine turned over and in so turning over, the steam and scalding water escaped from the same and the decedent was so crushed, mangled, bruised, scalded and burned that he died as a result of his injuries.

It is alleged that the defendant railway was negligent in the following particulars:

That the place of the initial derailment was around a very sharp curve, the track curving to the left in the direction the engine was going.

That the decedent was on the outside of the curve.

That the track did not have sufficient elevation on the right hand side to render it safe to propel an engine weighing in the neighborhood of two hundred tons, as did the engine in question.

That for an engine of that weight the elevation of the track was insufficient on the right hand side.

That at said initial point where the trucks got off the track the rails and track were not firm and secure, but on

the contrary the curve was very sharp, was insufficiently braced, and the rail sat on iron plates on ties which were insufficiently spiked.

That on the outside of said rails the plates had openings or holes for two spikes, which were necessary to give them a firm setting on the tie, whereas all of said plates had on the outside a spike in only one of said openings, which is alleged to have been negligence and which is alleged to have [fol. 166] made the track insecure and allowed the rails to yield to the pressure of a heavy train at said point, and which is alleged to have caused a certain amount of looseness and vibration in the rail and caused the same to give at the top and to have a tendency to give and thus enable the flange of the wheel to ride over the rail at said point.

That at said initial point of derailment the crossties were rotten and out of condition and failed to support firmly and securely the spikes driven through said plates to hold the rail in place.

That the rotten condition of said ties allowed the spikes to have play and room and the same were not tight, and allowed the right to vibrate and give, and allowed the flange of the wheel to climb over the side.

That on account of the constant vibration and rottenness of the ties at the time of the collision, the said spikes had worked up to a point above the flange of the rail and did not come in close and tight contact with the same so as to make the same secure.

That there was a space between the head of the spikes and the bottom flange of the rail which allowed play and vibration and looseness and insecurity in said rail.

That the insufficiency of the outer or bearing rail, due to all of these causes, caused the trucks to mount the rail, and the right hand wheel went off on the outside rail and the left wheel went off on the inside.

That the flanges of the front wheels of said engine were sharp and out of condition.

The petition further alleges that the engine was equipped with what is called a watchman, which was an apparatus consisting of pipes, iron or steel contrivances and other apparatus under the body of said engine, extending from the back to the front thereof and consisting of cylinders, valves [fol. 167] and other apparatus, including air, and which automatically, whenever said front wheels of said engine

should leave the track, was designed, by means of a valve which was tripped by the derailment of said wheels, to apply the air on the brakes of the entire train. It is alleged that had said appliance known as a watchman been in repair, the movement of said train at said point would have been stopped in a couple of hundred yards, which would have been automatic and without any effort on the part of the engineer; that the defendant failed, before said engine left Birmingham, Alabama, to properly inspect said watchman to see that the same was in condition to work; that the said watchman was not in working or functioning order at the time of said derailment; that the same failed to apply the brakes as was its design and purpose and as it would have done had the defendant exercised its duty of inspection; that had said watchman functioned, the train would have been stopped long before striking said right hand switch and the decedent's life would have been saved.

The petition further alleges that at a point about twenty-five or thirty-five feet west of the switch which turned to the right and at which point the engine finally left the track, the cross-ties were rotten and not securely ballasted, and that the spikes were almost out of the plates and the rail was not secure, all of which contributed to the final derailment after the engine had run said seven-tenths of a mile.

It is alleged that on account of each and all of the foregoing negligent acts and omissions of the defendant, and on account of each and all of the defective and insufficient conditions of the defendant's engines, appliances, machinery, track and roadbed, the derailment and turning over of the engine and consequent death of the decedent occurred.

The plaintiff brings this action under the Act of Congress [fol. 168] of April 22, 1908, and all subsequent amendments thereto regulating the liability of carriers engaged in interstate commerce to their employees.

It is alleged that the decedent was a widower; that he left surviving him two children: one, Mrs. Lunsford, and the other, Hubert A. Cox, who were his only surviving children; that the decedent's life was a value to the children; that he was fifty-nine years of age and had an expectancy in life of 14.92 years; that his earnings were about $325 per month and would have continued throughout his expectancy; that he contributed out of his earnings for the benefit of his two surviving children $200 per month, which

contributions would have kept up until his death, these contributions being in money, in services, in house rent, in contributions of property, groceries, automobiles, furniture, and in payment to employees for services rendered said two children. The plaintiff sues for fity thousand dollars damages.

Gentlemen, there is a second count in the petition. I have read you the first count, at least I have read you the substance of the first count, now I will proceed to define to you the substance of the second count. In the second count, instead of alleging the cause of the initial derailment which was 1.35 miles west of the station of Bremen, as I read to you in the first count, it is alleged that at said point 1.35 miles west of Bremen the front trucks of said engine struck a rock or other object negligently allowed by the defendant to be on the track and adjacent to the rails and that upon striking said rock the front trucks were derailed. It is alleged that the defendant was negligent in allowing the rock or other obstruction to be on the track at said time and place. It is alleged that the defendant's section hands were negligent in failing to properly inspect the track at said point, as the curve was very acute and dangerous and as [fol. 169] said rock or obstruction had remained on the track for upwards of one hour before said train passed in close proximity to said station at Bremen, Georgia; that the curve was to the left at said place and had been for three hundred yards; that the engineer was on the outside of the curve and had no opportunity to see the track any distance ahead of the engine; that the fireman on said engine was on the inside of the curve; that the engine was provided with an automatic stoker which fired the same by machinery and required only the turning of valves; that at the time of the initial derailment the fireman had no other duty to perform than to look out on his side of the engine and in the exercise of ordinary care should have looked out on his side of the engine, as that was the only side from which the track could be seen, it being on the inside of the curve; that the fireman, in the exercise of ordinary care, could and should have discovered said rock on the track and adjacent to said rail, and yet said fireman negligently failed to discover the same and failed to warn the engineer of said obstruction; that had the fireman discovered said rock and warned said engineer at a distance of one hundred or more yards away,

when he could have discovered said rock, as the same was then visible, the decedent would have been able to apply his brakes and stop the train before it finally left the track.

It is further alleged in the second count that after striking said rock the front trucks left the rails, but the engine was not derailed and continued to function apparently normally to the engineer and fireman for a distance of seven-tenths of a mile, at which point it struck a switch going out to the right from the track; that in so striking the switch the front trucks were turned to the right and were obstructed and caused to be thrust under the engine, and this, together with the large axles and wheels of said trucks and its general obstruction in turning to the right on striking said switch, threw the entire engine off the track and caused it [fol. 170] to turn over on its side after running about a hundred yards. Then follows an allegation similar to that in the first count as to the engine being equipped with what is called a watchman, which, it is alleged, if it had functioned, would have stopped the engine long before striking the right hand switch and thus saved the life of the decedent. Also in the second count is a similar allegation to the allegation in the first count to the effect that at a point about 25 or 30 feet west of the switch which turned to the right and at which point the engine began to turn over and finally did turn over, that the cross-ties were rotten and not securely ballasted, that the spikes were almost out of the plates and the rail was not secure, and it is alleged that all of these negligent acts and alleged defective condition of defendant's engines, appliances, machinery and cars, due to its negligence, contributed to and caused the turning over of said engine and death of the decedent. Then follows a similar allegation as to the value of the decedent's services and the alleged damages claimed.

The plaintiff has filed an amendment to the suit in which it is alleged that the safety chains attached to the front end of the truck on the engine which became derailed were too short by from eight to fifteen inches; that the same did not have sufficient play to meet the exigencies of the swaying movements of the engine around curves and other portions of the track; that said short safety chains operated to pull up the truck at the curve where the same was first derailed, so as to contribute to and be one of the causes of the wheels of said front truck leaving the rails; that the

chains were a part of said locomotive and were not in proper condition and safe to operate in the service to which the same were put, and that the same did not function properly. This amendment is made to apply to both counts of the petition.

[fol. 171] The defendant, gentlemen, has failed its answer in the case. You will have the pleadings out before you and you can read them all if you want to. I am simply calling your attention to the substance of it. The defendant admits the second paragraph in each count, to the effect that it is a railway corporation running a line of track and having an office and agent in Haralson county. It further admits the fourth paragraph of each count to the effect that on February 14, 1933, the decedent, Cox, was an engineer in the employment of the defendant and that on that day he was engaged in interstate commerce and that the defendant railway was engaged in interstate commerce, in that decedent as engineer was driving a passenger train of the Southern Railway from Birmingham, Alabama, to Atlanta, Georgia. The answer either denies all the other averments of both counts of the petition, or states that for want of sufficient information defendant can neither admit nor deny the same. In answering the fifth paragraph of both counts the defendant's answer states that while rounding a curve on defendant's track the wheels of the front truck of the engine struck a rock which had been placed on the track by someone without the knowledge of the defendant or its employees, and were thrown from the rails, while the drivers and other wheels of said engine remained on the track; that the front trucks were out of view of the engineer and fireman and were suspended in such a way that the engine still continued to function normally for a short distance.

In answering paragraph six of the first count, the defendant says that its investigations showed that after the wheels of the front end of the engine left the rail it ran for a distance of approximately seven-tenths of a mile until it reached a switch going out to the right from the main line, at which point the engine was derailed and turned over; that apparently said front wheels of said truck were off the [fol. 172] track from the time the same struck the rock, and apparently when the front wheels struck the switch they were thrown to one side and derailed and turned over the engine; that in the derailment Cox, the engineer, was so injured that he died in about one hour.

Substantially the same answer is made by the defendant in answering the ninth paragraph of the second count. In answering paragraph nine of the first count, the defendant says that the truck struck the rock at a point approximately 1.35 miles west of the station of Bremen on a rather sharp curve to the left in the direction in which the engine was going; that it assumes the decedent was on his seat box on the right side of the engine, which would have placed him on the outside of the curve; and that its information is that the train was proceeding at the regular schedule of speed.

In answering the tenth paragraph of the first count, the defendant says that the iron plates on the ties on the outside of the rail had openings or holes for two spikes, and that there was a spike in only one of said openings, all of which was usual and customary not only at that point but at all other points along its line of railway and is the usual and customary way for said plates to be spiked.

Answering paragraph fifteen of the first count, the defendant says that the engine was equipped with an experimental device known as "Wright's Little Watchman," which was attached to certain apparatus connected with said engine and which was so designed that under certain conditions the derailment of the front truck wheels would trip a valve and thereby apply the air on the brakes of the train; that the same was in good condition on said engine at the time, but apparently the proper conditions did not develop which would cause the tripping of said valve and the application of said brakes; that the same is merely an experimental device which will not operate at all times when said truck wheels leave the track but will operate [fol. 173] only when conditions develop which will trip the same; that said device is not in use on all railroads and is not required to be used under the Safety Appliance Act of Congress or any regulations made in pursuance thereof, and that it was no part of the duty of the decedent to inspect the same.

The defendant in answering paragraph ten of the second count makes the same answer as to the device known as the watchman as is made in response to paragraph fifteen of the first count.

In answering paragraph eight of the second count, gentlemen, the defendant says that the point where the rock was on the track was on a curve to the left; that the engi-

neer's duties placed him on the outside of the curve. The defendant denies that the curve extended anything like three hundred yards, and in the defendant's answer it is stated that it assumes that the fireman was at some point on the left side of the engine in the performance of his duties. It admits that the engine was provided with an automatic stoker which fired the same by machinery, the valves being operated by the fireman. The defendant denies any liability to the plaintiff in any sum whatever as to each count of the petition. They deny generally the remaining allegations of the plaintiff's petition and amendment. You will have the pleadings out with you and you can look to this more fully if you so desire. I have only read the substance of the pleadings, but I think I have read a sufficient part of the pleadings to define to you the issues in the case. You are instructed that if the plaintiff recovers in this case she must recover upon the allegations of negligence contained in the petition, and she cannot recover upon any state of facts outside the allegations of the petition. She is not required, however, to prove every allegation of alleged negligence set forth in her petition. It is sufficint if she shows by the evidence that any one [fol. 174] or more of these alleged acts occurred, and that they constituted negligence, and that such act or acts was or were the proximate cause of the decedent's death. If the evidence shows this, she is entitled to recover damages.

You are instructed that the burden is upon the plaintiff to make out her case to the satisfaction of the jury by a preponderance of the evidence. By a preponderance of evidence is meant that superior weight of the evidence upon the issues involved which, while not enough to wholly free the mind from a reasonable doubt, is yet sufficient to incline a reasonable and impartial mind to one side of the issue rather than to the other. In determining where the preponderance of evidence lies, the jury may consider all the facts and circumstances of the case; the witnesses' manner of testifying, their intelligence, their means and opportunity for knowing the facts to which they testify, the nature of the facts to which they testify, the probability or improbability of their testimony, their interest or want of interest, and also their personal credibility so far as the same may legitimately appear from the trial. The jury may also consider the number of witnesses,

though the preponderance is not necessarily with the greater number.

The law under which this case is being tried is the Act of the United States Congress of 1908, so far as is applicable to this case, that act provides that every common carrier by railroad, while engaged in commerce between any of the several states of the Union, shall be liable in damages for the death of any employee in such commerce, such liability is to be the employee's personal representative for the benefit of the surviving widow and children of such employee, such liability to be where death results, in whole or in part, from the negligence of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, [fol. 175] engines, appliances, machinery or other equipment. This law further provides that in all actions brought against any such common carrier by railroad under any of the provisions of this Act to recover damages for the death of an employee, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. Provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

I will now charge you, gentlemen, upon the aspect of the plaintiff's case which deals with alleged negligence other than the charge of violation of what is known as the Safety Appliance Act and amendments thereto. I will later charge you separately as to the effect of any violation of the Safety Appliance Act. The law which is now being given to you is applicable to all the other charges of negligence contained in the two counts of the petition, except those relating to the Safety Appliance Act.

There are certain risks of an employment which an employee assumes in entering employment, and if injury results from some of these assumed risks, then there is no liability for such injury on the part of the employer. An employee assumes the risks of such dangers as are normally and necessarily incident to the occupation, whether

he is aware of them or not. A risk of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work, or suitable and safe appliances for the work. These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless the defect and risk alike are so obvious that any ordinarily prudent [fol. 176] person under the circumstances would have observed and recognized them. An employee does not, however, assume the risk of conditions of which he is not aware or which, in the exercise of ordinary care, he would not have discovered.

You are instructed, gentlemen, that negligence is the failure to exercise legally required care. The care which was required of the defendant in this case, as well as that which was required of the decedent, was ordinary care. Ordinary care is that care which every prudent person would exercise under the same or similar circumstances. As I have just stated, negligence is the failure to exercise the care which the law requires. If the plaintiff in this case has not proved by a preponderance of the evidence that the defendant was negligent in some or all of the particulars described in the petition, or that the defendant had violated, in the respect stated in the petition, what is known as the Safety Appliance Act as applied to the locomotive and its parts and appurtenances, and if the plaintiff has not likewise proved that such negligence or such violation of the Safety Appliance Act was the proximate cause of the death of the decedent, there can be no recovery of damages in this case.

If you find from the evidence that the decedent was negligent and that his negligence was the sole and only cause of his death, then there could be no recovery in this case. You are instructed, however, that if the defendant was negligent in some or all of the particulars described in the petition, and if such negligence in part was the cause of the death of the decedent, then and in such event if you find that the decedent was guilty of negligence, such negligence of the decedent would not entirely defeat a recovery, but would only diminish or reduce the damage which would be awarded to the plaintiff, and in such case of negligence on [fol. 177] the part of the decedent the damages would be

diminished by the jury in proportion to the amount of negligence attributable to the employee, Mr. Cox. If the jury find from the evidence that the decedent was negligent in the manner of performing his duties, or in not properly guarding against danger under the circumstances of the case, then you would consider these acts of negligence, if you find the defendant was guilty of negligence which in part contributed to the death of the decedent. In such case, if you find that the decedent was guilty of some negligence, but that the defendant's negligence was also in part the cause of such death, then the decedent's negligence would be considered by the jury in reduction of damages, and such negligence would reduce the amount in proportion to the amount of negligence attributable to the decedent.

Negligence is a question of fact for the jury under proper instructions from the court. The court can give the jury the general standards of diligence and care, but as to whether the conduct of the parties come up to or falls short of those standards, is a question of fact for the jury.

The defendant contends in this case that it was not negligent in any respect, and this contention goes to every claim made by the plaintiff, and you will consider this contention of the defendant in deciding upon the question as to whether there is any negligence in the case and as to whether there is any liability or not in the case.

The defendant further claims that the decedent met his death as a result of risks assumed by him in the service of the defendant. You will consider this contention in the light of the instructions which I have given you upon this subject. I will now instruct you upon the allegation contained in paragraph 15 of the first count and paragraph 10 of the second count, the substance of which is that there was upon the engine an appliance known as a "watchman," [fol. 178] which consisted of cylinders, valves and other apparatus, including air, and which was under the body of the engine and extended from the back to the front end thereof, and which automatically, whenever the front wheels of the engine should leave the track, was designed, by means of a valve which was tripped by the derailment of the wheels, to apply the brakes on the entire train, and that had this appliance been in repair and had this appliance functioned, the train would have stopped long before striking the right hand switch and would have saved the life of

the decedent. The allegation is that this contrivance was not in working or functioning order at the time of the derailment, that the same failed to apply the brakes as was its design and purpose, and that had the "watchman" functioned, the train would have stopped long before striking the right hand switch.

The court charges the jury that under the Act of Congress in force at the time of the alleged derailment in this case and death of the decedent, it was provided as follows: "It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender and all parts and appurtenances thereof, are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28, 29, 30 and 32 and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for." You are further instructed that the law to which the court has called your attention applies to the locomotive, its boiler, tender and all parts and appurtenances thereof, and the court charges the jury that a contrivance built on the engine and attached [fol. 179] to certain apparatus connected to the engine, and which was so designed that under certain conditions the derailment of the front wheels would trip a valve and thereby apply the air on the brakes of the train, is a part and appurtenance of the engine or locomotive; provided, gentlemen, you find the following to be true:

The defendant contends that the device known as Wright's Little Watchman is really in an experimental stage, that it was in use at the time as an experiment only, that it was not perfected, that it would work sometimes and at other times it would not, and therefore it was not used as a permanent part of the locomotive. I charge you on this question that if you find from the evidence, (and that is purely a question for you) that this device known as Wright's Little Watchman had not been in general use on this road, or on other roads, for a sufficient length of time to be a fixed and permanent and reliable device for the purpose for which it was used, and that its use, as con-

tended, was simply an experiment, and this limited or experimental use was such that the decedent did not and was not authorized as a reasonably prudent man to rely on the working and operation of this device at this particular time, then in that event the failure of this device to work or to perform its functions would not be charged against the defendant as negligence, and the defendant would not be liable for a failure on the part of this device to operate properly.

Now, on the other hand, I charge you that if this device, known as Wright's Little Watchman, had been in general use by the defendant, or by railroads in general, for such a length of time and in such general use that it became a fixed and permanent part of the locomotive, and that use was such as to hold out to the decedent, the engineer in this case, that it was a reliable device, that it could be relied upon by him to function, and that any prudent man [fol. 180] would have relied on this device under all the circumstances of the case, then the failure of this device to operate or to function, which failure was caused by and brought about by a failure to inspect the same and keep the same in proper working order, then and in that event such failure to operate or function would be negligence on the part of the defendant. If you find, gentlemen, that this device was used, as I say, so generally used for such length of time by the defendant that it became a part and appurtenance of the engine, and that the decedent was authorized to rely on it at this particular time by the conduct of the defendant in putting it on the engine and using it, under all the circumstances, then the following law would apply and this would be considered a part and appurtenance of the engine or locomotive at this particular time. I charge you that the duty put upon the defendant railway by the Act of Congress which the court has called your attention to, to keep the locomotive and all parts and appurtenances thereof in proper condition and safe to operate in the service to which the same are put, is an absolute duty on the railway. It is not subject to any limitation or condition, is positive and not dependent, and unqualified by any consideration whatever. Now, gentlemen, if the defendant at that particular time put this device there for the purpose for which it was intended, it was the duty of the railroad company at this

time to see that it was in proper working order, whether it was in an experimental stage or not. Failure to inspect it and see that it was in proper working order would be negligence, provided of course that the derailment of the locomotive was brought about by failure to have the "little watchman" in proper working order. These are questions for you. All questions of fact are for you. If you believe from the testimony that the defendant failed to have the part and appurtenance of its locomotive, known as the [fol. 181] watchman, in proper condition and safe to operate in the service to which the same was put, and if the same did fail to function and operate, and if its failure to so operate, because it was not maintained in good condition, was the proximate cause of the death of Mr. Cox, then the plaintiff could recover in this case. Of course, the circumstances at the time should be such as to cause a reasonably prudent man and a reasonably cautious man to have relied upon the "little Watchman". I mean to say that if the circumstances were such as to hold out to Mr. Cox that this contrivance was there and was in proper working order, and it was not, then of course if the death was caused by the failure of this contrivance of work, if that was the cause of it, then of course the railroad company would be liable, provided of course that they did not inspect it and put it in proper working order at that particular time.

If the jury believe from the evidence that the initial or first derailment at a distance of 1.35 miles from the depot at Bremen occurred from some cause other than the railway company's negligence, such as the placing of a rock on the track, still, if you believe from the evidence that this engine was equipped with a part and an appurtenance known as a watchman, which was designed to trip a valve when the front trucks should become derailed, and if you believe that had it been in proper condition and safe to operate in the service to which the same was put that it would have caused the valve to trip when the front trucks became derailed, and that had it functioned the train would have been stopped by applying the brakes before it finally became derailed, and if you believe that the failure of this watchman to properly operate was due to the fact that it was not in proper condition and safe to operate in the service to which it was put, and that if it had operated the

train would have been stopped and the decedent's life [fol. 182] saved, then I charge you in that event the defendant would be liable in this case for damages to the plaintiff. This, gentlemen, is qualified under the charge I gave you a while ago on the question of whether or not the "little watchman" had been in use so long and to such an extent by the railroad company that the engineer was authorized to expect it to operate and to rely upon its functioning, and was not simply put there as an experiment on this occasion and known to him as such or should have been known to any prudent man under all the circumstances.

Now, gentlemen, the Employers Liability Act of 1908 provides that no employee who may be killed in the employment of a carrier engaged in interstate commerce, and who is himself engaged in such commerce, shall be held to have been guilty of contributory negligence in any case where the violation by the common carrier of any statute enacted for the safety of employees contributed to the death of such employee. Therefore, I charge you that if Mr. Cox met his death because of the defendant's violation of the Safety Appliance Act of Congress which I have read to you, then I charge you that the defendant railway can neither claim that Mr. Cox assumed the risk of the result of such violation, nor would any contributory negligence of Mr. Cox be treated to reduce the damage, if the violation by the railway of this statute contributed to his death.

If you find under the instructions given you, either on the first branch of this case as to the issues of negligence on the part of the railway company and on the part of the decedent, or on the second branch of the case as to alleged liability for failure to comply with the Safety Appliance Act, then you would go no further in your deliberations, but you would return a verdict for the defendant. If on the other hand you find for the plaintiff, it would be your duty to assess the damages. Of course, in considering the [fol. 183] question of damages, the jury will consider the rule which the court has previously given as to the effect of the decedent's negligence, if any, upon the amount of recovery, all of which I have charged you fully upon. The charge upon the measure of damages relates to the full amount of damages which are recoverable in a case of this kind, and you will bear in mind, as just stated, any reductions in that amount under the instructions herein-

before given you, if you apply them to the measure of damages.

You are instructed that this action is brought for the benefit of the surviving son and daughter of the decedent, who are named in the petition. You are instructed that the measure of damages in such a case as this is the financial benefit which might reasonably be expected from the decedent to the children, who are the beneficiaries, in a pecuniary way. The damages are such as flow from the deprivation of pecuniary benefits which the beneficiaries might reasonably have received if the decedent had not died from his injuries.

The mortality tables have been introduced in evidence for the purpose of enabling you to have light on the question of how long the decedent might have lived. Such tables are not binding upon you, and you may make your own finding upon this question if you desire to do so, but you may use the tables, and if you use them, the mortality table is only designed for the purpose of giving the expectancy in years of persons at given ages.

If you find for the plaintiff, and if you find that the decedent's life was of financial benefit throughout the whole or part of his expectancy to the two children named in the petition, then you would decide on the amount of that benefit to these children so long as you find the same would last. When you decide upon the amount of the pecuniary benefit which the decedent's life would have been to his two children, if any, under the conditions hereinbefore stated, it [fol. 184] would not be proper to give the gross amount of these benefits in the verdict which you would render in this case, because, inasmuch as the sum is paid down all in cash, the amount would have to be reduced to its present cash value.

You are instructed that the present cash value of the future benefits of which the beneficiaries were deprived by the death of the decedent, making adequate allowance according to the circumstances for the earning power of money, is the proper measure of damages in an action of this character. In determining what rate of interest you should find the money would bring, and hence what rate of discount should be used by you in reducing this amount to its present value, you would consider all the facts and circumstances of the case. Local conditions are not to be dis-

regarded, nor should the discount necessarily be at what is commonly called the legal rate of interest, that is, the rate limited by law beyond which interest is prohibited. It may be that such rates are not obtainable upon investments on safe securities without the exercise of financial experience and skill. The compensation should be awarded upon a basis that does not call upon the beneficiaries to exercise such skill. It is a matter for you to decide as to what the earning power of money at this place and this time, on the best and safest investments, would be. You are authorized to make the calculation, reducing the sums found by you to their present value by any proper mathematical calculation. In other words, whatever the annual loss of these beneficiaries might be throughout the expectancy of the decedent, or throughout such part of his expectancy as you decide that these beneficiaries would receive annual benefits, the sum would be reduced to its present cash value upon the rate of interest which you fix as reasonable and right under the circumstances of this case, as I have just stated. In [fol. 185] reducing these sums to their present cash value, you may use any proper mathematical method of determining that question. The theory of the law is, in giving a present cash value for benefits paid in future installments, to give such sum as put out at what you find to be the proper rate of interest which the beneficiaries could secure on safe investments at this time and place, would earn the amount of these future installments which you find the beneficiaries would have received had the decedent lived, and by taking off a part of the principal each year would, at the end of such time as these annual benefits are estimated for, be entirely exhausted.

Now, in estimating the earnings of a man, it rarely if ever happens that a man labors every day until his death, or receives all the while a fixed and regular income from his labor, nor does his capacity to earn money often remain undiminished until old age. In arriving at what you might find to be the earnings of the deceased, which is one of the steps you would have to take in determining how much pecuniary benefit his life would be to the beneficiaries, you should take all these things into consideration: Feebleness of health, actual sickness, the loss of employment, voluntary

abstaining from work, dul-ness in business, reduction in wages, the increasing infirmities of age with the corresponding diminution of earning capacity, and other causes which contribute in a greater or less degree to decrease the earnings of a life-time. In estimating what a man might earn throughout his expectancy, a proper allowance and deduction should be made in favor of the defendant for any diminution in labor which would result from any of these sources. The defendant is not responsible for the consequence of the acts of others not its agents, nor for results which, in any event and without reference to the conduct or negligence of the defendant, have come to pass.

[fol. 186] If upon considering the whole case you find that the defendant is not liable to the plaintiff, you would return a verdict for the defendant, and in that event the form of your verdict would be, We the jury find for the defendant. If, on the other hand, you find for the plaintiff, the form of your verdict would be, We the jury find for the plaintiff against the defendant so many dollars and cents, stating it in one lump sum. Whatever your verdict may be, date and sign it by your foreman and let us know, and you will be allowed to publish it in court.

The above and foregoing eighteen typewritten pages approved as correctly setting forth the charge of the court in the above stated case. Let the same be filed as a part of the record in said case.

This April 5, 1934.

J. R. Hutcheson, J. S. C. T. C.

[File endorsement omitted.]

[fol. 187] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 188] [File endorsement omitted.]

[fol. 189] IN COURT OF APPEALS OF GEORGIA

24153

SOUTHERN RAILWAY CO.

v.

LUNSFORD, ADMX., ETC.

OPINION

By the Court:

SUTTON, J.:

Mrs. Olivia Cox Lunsford, as adminstratrix of the estate of James Monroe Cox, brought suit for damages against the Southern Railway Company, on account of the death of her intestate by reason of the defendant's alleged negligence. Plaintiff averred that Cox's death ensued when a locomotive-engine of the defendant, of which Cox was an engineer, and which he was running from Birmingham, Ala., to Atlanta, Ga., overturned and wrecked, and Cox was mangled, burned, and scalded to his death by reason of the steam and boiling water escaping from the overturned engine; and that this was the result of the alleged negligence of the defendant in having a defective locomotive-engine, insufficient appliances, and a defective and insecure track and roadbed. Plaintiff alleged that defendant's locomotive was equipped with an apparatus known as a "watchman," and that, had the same been in proper repair and condition when the front trucks left the rail, it would have tripped a trigger and automatically applied the air to the airbrakes and stopped the engine within 200 yards, thereby preventing the engine from finally leaving the rails and overturning; and it was alleged that the defendant failed to inspect said engine before leaving Birmingham on this trip and that an inspection would have disclosed the condition of the "watchman." Plaintiff alleged that the action was brought under the act of Congress of April 22, 1908, and all amendments thereto, regulating the liability of interstate carriers. She further set up that she was the daughter of the deceased, who was a widower, that he had one other child, a son, and that the deceased contributed $200 a month of [fol. 190] his earnings to the support of his children. There

was an allegation in the second count of the petition that a rock or other object was negligently allowed by the defendant to be on the outside rail at the point where the front trucks left the rails, which should have been discovered by the defendant's employees. It was alleged in both counts that the front trucks of the engine first become derailed and after running about seven tenths of a mile on the ties off the rails, the engine came to a switch, whereupon it finally jumped the track and turned over, and that from this switch to where the engine turned over, about 100 yards, the crossties were in a rotten condition, all of which contributed to the wreck of the engine. The material difference between the two counts is that in the first the plaintiff alleged that there was a sharp curve at the place of the initial derailment, and that the improper elevation of the rails, the rotten ties, and the absence of proper spikes at this point had caused the track to become defective and thereby caused the derailment of the front trucks, which should have been remedied by the defendant's employees; and in the second count, it was alleged that a rock or other object at this point caused the derailment, which likewise could have been discovered by the defendant's section foreman had he been performing his duty, and likewise could have been seen by the fireman of the engine had he been keeping a proper lookout from his side of the cab, but which could not be seen by the deceased from his side of the cab. It was contended by the plaintiff that had the "watchman" attached to the locomotive been in proper condition, the subsequent overturning of the locomotive would have been averted; and also that the defendant's failing to discover the defective [fol. 191] "watchman," which proper inspection would have disclosed, which it was not the duty of the deceased to make, but which it was the duty of defendant to make, was negligence, and had the condition of the watchman been discovered, the wreck would have been prevented.

The defendant demurred to both counts of the petition upon the ground that they set up no cause of action against it, and upon various special grounds. The trial judge overruled the demurrer upon all grounds. To the overruling of the demurrer the defendant excepted pendente lite, and assigned error thereon in the bill of exceptions.

Plaintiff amended her petition, the substance of the amendment being that the safety chains attached to the

front end of the front trucks on the engine were too short and operated to pull the trucks up at the point where the engine was first derailed, and therefore were a contributing factor to the engine's leaving the rails, and that these chains were not in a proper condition and that it was not safe to operate the locomotive in that condition, and that the defendant and its agents placed the chains upon its engine in this manner and condition.

Defendant demurred to this amendment upon the ground that the allegations thereof were vague and were mere conclusions, and also that they furnished no issuable facts or reason why the defendant was liable for the death of the deceased, and that there were no averments showing or tending to show that these chains were required by the safety-appliance acts of Congress and there was nothing to show that the manner in which these chains were placed on the engine was a violation of the acts of Congress or of the rules or regulations of the interstate-commerce commission. The trial judge overruled this demurrer, and the defendant excepted pendente lite, and assigned error thereon in the bill of exceptions.

[fol. 192] On the trial the plaintiff introduced evidence tending to support the allegations of her petition. The defendant defended the action upon the theory that what caused the derailment was the rock placed upon the track by some miscreant, but not by any of its employees, that the "watchman" was not out of repair, that the wreck was not caused by the "watchman" not being in condition, that the "watchman" was not a part of the locomotive and was not required by the safety-appliance acts or any rule of the commission, that the wreck was not caused by any act of negligence or otherwise, or any omission of duty upon the part of the defendant, that the deceased did not earn the monthly sum alleged, and that it was not liable to the plaintiff on account of the death of the deceased, it not being guilty of any negligence, as alleged.

The trial resulted in a verdict for plaintiff for $5,000. Defendant moved for a new trial, the motion was overruled, and a writ of error was brought to the Supreme Court, where it was transferred to this court, because this court and not that court had jurisdiction thereof.

[fol. 193] 1. An action may be properly brought under the Federal safety-appliance acts by the administratrix of

the deceased employee of an interstate carrier, who was a widower, and contributed a part of his earnings to the support of his two children, one of whom is the administratrix, although neither of them is a minor. It is contribution rather than dependency that gives rise to an action for the death of an employee of an interstate-railway company under the safety-appliance acts. U. S. C. A., Title 45, § 51, notes on pp. 93, 360-5; Moffett v. B. & O. R. Co., 220 Fed. 39; Chesapeake & R. Co. v. Shirley, 218 Ky. 337 (291 S. W. 395); W. & A. R. v. Townsend, 36 Ga. App. 70 (135 S. E. 439).

2. A petition alleging that the defendant railway company was negligent in the manner in which it maintained its railroad-track at a certain curve thereon, that the death of plaintiff's intestate was caused by the derailment of the front trucks of a locomotive on account of the unsafe and insecure track and roadbed at this curve, the ties being rotten and the spikes being loose, which was all apparent and visible, causing the outside rail to become insecure and without sufficient elevation, allowing the front trucks of the locomotive, of which the decedent was engineer, to get off the rails at this point; and alleging that the defendant was negligent in allowing its tracks to remain in this condition and that the same should have been remedied by the defendant's section-foreman had he properly performed his duties in the inspection and maintenance of the tracks at this curve, set out a case good as against demurrer. [fol. 194] Questions of negligence, proximate cause, diligence, due care, etc., are generally for a jury to determine, except in plain and unmistakable cases. If the defendant was negligent, as alleged, in the maintenance of its tracks, and if this negligence caused the front trucks to derail, which in turn caused the engine to turn over, killing the deceased, nothing else appearing, defendant would be liable to the plaintiff. L. & N. R. Co. v. Bean, 49 Ga. App. 4 (174 S. E. 209): Central of Ga. Ry. Co. v. Leonard, 49 Ga. App. 689 (2) (176 S. E. 137).

3. In pleading, reasonable certainty is all that is required. Matters relating to the structural condition of a railroad-track, or of a locomotive engine, or of appliances thereon concerning defects in the same, where it is charged that a railway company is negligent in their condition, in

failing to keep them in proper repair, in failing to inspect the same, and that such defective locomotive, appliances, and insecure track and roadbed contributed to and caused the death of plaintiff's intestate, need not be alleged with minute particularity as to details, condition, structure, and so on. The plaintiff is not required to do more than clearly and definitely describe these matters. They are such as lie peculiarly within the knowledge of the railroad company, and all that is required is for the plaintiff to state her cause of action with sufficient definiteness and completeness to enable the defendant to ascertain the nature of the charges made against it and of the acts of negligence alleged, so that it may properly prepare its defense thereto. Cochran v. Kendrick, 43 Ga. App. 135, 138 (158 S. E. 57); Charleston, etc., R. Co. v. Attaway, 7 Ga. App. 231 (66 S. E. 548); A. C. L. R. Co. v. Davis, 5 Ga. App. 214, 217 (62 S. E. 1022); [fol. 195] Southern Ry. Co. v. Black, 141 Ga. 35, 38 (80 S. E. 323); King Hardware Co. v. Ennis, 39 Ga. App. 355 (5) (147 S. E. 119); Central Ry. Co. v. Brandenberg, 129 Ga. 115, 120 (58 S. E. 658); Bittick v. Ga., Fla. & Ala. Ry. Co., 136 Ga. 138, 140 (70 S. E. 106); Cedartown Cotton, &c. Co. v. Miles, 2 Ga. App. 79 (58 S. E. 289).

4. The gist of section 23 of the act of Congress of April 22, 1908, as amended in 1911 and 1915, known as the Federal safety-appliance act, which was passed for the purpose of regulating the liability of interstate carriers, is to make it "unlawful for any carrier to use * * * any locomotive unless said locomotive, its boiler, tender and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which put," and further that "said locomotive, its boiler, tender and all parts and appurtenances" must be inspected as therein provided U. S. C. A., Title 45, § 23. This law imposes on carriers in interstate commerce the absolute duty to keep their locomotives and all the parts and appurtenances thereof free from defects and safe to operate. It is not a question of negligence, but the railway company is bound to see that all parts and appurtenances are in a safe and proper condition. Lehigh Valley R. Co. v. Beltz, 10 Fed. (2d) 74; Hines v. Smith, 275 Fed. 766; Frederick v. Erie R. Co., 36 Fed. (2d) 716; W. & A. R. Co. v. Townsend, supra; W. & A. R. v. Meister, 37 Ga. App. 570 (140 S. E. 905).

The only defense that an interstate carrier can make to a suit based on the Federal law above referred to, brought for the death of an employee, is that proper appliances were provided and were maintained in good condition, and that the appliance alleged to be defective was not a contributing cause to the death of such employee. S. A. L. Ry. [fol. 196] Co. v. D'Avignon, 41 Ga. App. 263 (153 S. E. 96).

5. A safety device constructed and designed for the purpose of automatically applying the airbrakes whenever the front trucks of a locomotive engine leave the rails from any cause, called a "watchman," which is attached to the front trucks under the boiler of the engine, some 35 or 40 feet in front of the cab where the engineer sits, and which will, if in proper working condition, when the trucks leave the rails and drop down as much as two and a half inches, trip a trigger, which opens a valve and puts the airbrakes on, and will stop the train within 200 yards; and which in this case had been attached to the locomotive for from five to seven years, and with which all of defendant's locomotives on this division are equipped, is properly a part and appurtenance of the locomotive, within the purview of the Federal safety-appliance laws, requiring a locomotive engine of an interstate railway company and all parts and appurtenances of such locomotive to be in proper condition to operate safely, and that they be kept in that condition, although the appliance is not one that is required by such Federal laws to be attached to the locomotives of interstate railway companies.

6. An action brought by the administratrix of a deceased railroad engineer, whose death resulted from the overturning of a locomotive engine of the defendant railway company, which the decreased was in charge of and operating in interstate commerce as engineer, under the Federal act of 1908, as amended in 1911 and 1915—in which act it was provided that all locomotives, boilers, and tenders, and all parts and appurtenances thereof, must be in proper working condition at all times, and that the locomotives and all [fol. 197] such parts and appurtenances must be properly inspected—where the petition alleged that there was attached to the locomotive in question a contrivance known as a "watchman," which was a device designed so that when the front trucks got off the rails for any reason it

would trip a trigger and cause the airbrakes on the entire train to be put on and would stop the movement of the train within 200 yards, and that this appliance was not in proper condition and did not work on this particular occasion, but that when the front trucks of this engine got off the rails the airbrake was not applied, and the front trucks of the engine ran along upon the ties for about seven-tenths of a mile, when the same came to a switch, and the trucks were thrown under the engine in such a way as to cause the engine to turn over and kill the engineer, a cause of action was set out under the Federal safety-appliance statutes, where it was further alleged that the defendant railway company had all its locomotives so equipped with the "watchman," that the same had been in use thereon for several years, that the deceased engineer had no other way of ascertaining when the front trucks of his engine were off the rails, and that had this little "watchman" been in proper working order it would have automatically applied the air and stopped the train and prevented the subsequent overturning of the locomotive which killed the decedent. This is so even though the Federal safety-appliance act and the rules and regulations of the interstate-commerce commission relative to interstate carriers do not specifically designate this particular contrivance as a safety device which must be placed upon the locomotives of interstate carriers, because when the defendant placed such device upon its locomotives it became a "part and appurtenance" thereof within the purview of the Federal statutes rela- [fol. 198] tive to safe appliances of interstate carriers. The fact that the little "watchman" was not a device in general use by other railway companies, and was not a standard safety appliance, would not prevent it from becoming a part and appurtenance of the locomotives of the defendant. If a part and appurtenance thereof, then, under the safety-appliance laws, it must be at all times kept in proper working condition, and if, as a result of the failure of such appliance to be in proper condition and to work on this particular occasion, the decendent, an engineer of the defendant railway, met his death, the railway company would be liable. It was an absolute duty on the part of the railway company to see that its locomotive, boiler, tender and "all" parts and appurtenances thereof were in proper condition and were kept in proper condition. S. A. L. Ry. Co.

v. D'Avignon, supra; Hines v. Smith, 275 Fed. 766; Baltimore & O. R. Co. v. Groeger, 266 U. S. 521 (45 Sup. Ct. 169); Johnson v. Southern Pacific Co., 196 U. S. 1 (25 Sup. Ct. 158, 49 L. Ed. 363); Lehigh Valley R. Co. v. Beltz, 10 Fed. (2d) 74; Kilburn v. Chicago, &c. R. Co., 289 Mo. 75 (232 S. W. 1017); Fredericks v. Erie R. Co., 36 Fed. (2d) 716; W. & A. R. v. Townsend, supra; Wyatt v. N. Y. &c. R. R. 45 Fed. (2d) 705.

7. The trial judge did not err in charging the jury in substance that if they found that the little "watchman" attached to the locomotive in question by the railway company was just an experiment and not designed as a part and appurtenance of the locomotive, there would be no duty resting upon the defendant to keep the "watchman" in repair or in functioning condition. This charge worked no injury to the defendant.

8. The trial judge did not err in charging the jury that [fol. 199] if they found from the evidence that the watchman had been in general use by the defendant for such a length of time that it became a fixed and permanent part of the locomotive and was, as to the decedent, held out as a part and appurtenance thereof, it was then such a part and appurtenance of a locomotive as is meant by and comes within the purview of the safety-appliance laws.

9. The trial judge charged the jury that it was the defendant's duty to keep the locomotive and all parts and appurtenances thereof in proper condition and safe to operate in the service to which put, that this was an absolute duty of the railway company that it was for the jury to determine under the facts whether or not the "watchman" was in proper working order, and that if the jury "believe from the testimony that the defendant failed to have the part and appurtenance of its locomotive, known as the 'watchman' in proper condition and safe to operate in the service to which the same was put, and if the same did fail to function and operate, and if its failure to so operate, because it was not maintained in good order, was the proximate cause of the death of Mr. Cox, then the plaintiff could recover in this case. Of course, the circumstances at the time should be such as to cause a reasonably prudent man and a reasonably cautious man to have relied upon the little 'watchman.'" This was a correct statement of the

law, with the exception of the last sentence; which was not error as against the defendant.

10. The court also charged the jury that if the initial derailment occurred from some cause other than the defendant's negligence, "still, if you believe from the evidence that this engine was equipped with a part and appurtenance known as a 'watchman' which was designed to trip a valve when the front trucks should become derailed, and [fol. 200] if you believe that had it been in proper condition and safe to operate in the service to which the same was put that it would have caused the valve to trip when the front trucks became derailed, and that had it functioned the train would have been stopped by applying the brakes before it finally became derailed, and if you believe that the failure of this 'watchman' to properly operate was due to the fact that it was not in proper condition and safe to operate in the service to which it was put, and that if it had operated, the train would have been stopped and the decedent's life saved, then I charge you in that event the defendant would be liable in this case in damages to the plaintiff." This charge was not erroneous and was not subject to any of the criticisms directed against it. Under the charge, as applied to the evidence, the jury were authorized to find that if the "watchman" had functioned, the brakes would have been applied, and that, if the brakes had been applied, the engine would not have subsequently overturned and killed the decedent, and that if the "watchman" had been in proper condition it would have functioned.

11. The charge of the court as a whole was correct and submitted the issues in this case to the jury in a fair and proper manner. There were two theories in the case, one of negligence and the other based on the safety-appliance laws, and the judge properly separated these theories and instructed the jury as to the same. None of the special assignments of error show any error as against the defendant. There was evidence tending to substantiate the plaintiff's case on both theories. The verdict was authorized, and the action was properly instituted by the plaintiff as administratrix of her deceased father, who contributed to the support of his children.

[fol. 201] 12. It follows, from the foregoing rulings, that the petition set out a cause of action as to two theories,

and the trial judge did not err in overruling the general demurrer; that the special demurrers were properly overruled, and the demurrer to the amendment was not well taken; and that there was evidence to support the verdict, and no error appeared upon the trial of the case, and the verdict was not contrary to law, and the trial judge did not err in overruling defendant's motion for new trial.

Judgement affirmed.

Jenkins, P. J., and Stephens, J., concur.

[fol. 202] In Court of Appeals of the State of Georgia

Judgment—February 22, 1935

This case came before this court upon a writ or error from the Superior Court of Haralson County; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed.

Jenkins, Stephens and Sutton, JJ., concur.

[fols. 203-218] Petition for Rehearing, covering 15 pages, filed Feb. 28, 1935, omitted from this print. It was denied, and nothing more by order of March 2, 1935.

[fol. 219] Court of Appeals of the State of Georgia

Order Denying Motion for Rehearing—March 2, 1935

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

[fol. 220] IN COURT OF APPEALS OF THE STATE OF GEORGIA

[Title omitted]

NOTICE OF INTENTION TO APPLY FOR CERTIORARI—Filed March 2, 1935

To Honorable Logan Bleckley, Clerk of Court of Appeals, of Georgia, State Capitol, Atlanta, Georgia:

Now comes Southern Railway Company, Plaintiff in Error in the above stated case, and, being dissatisfied with the decisions of the Court of Appeals of Georgia therein, gives this notice within ten days of the judgment of the Court of Appeals in said matter, that it intends to apply to the Supreme Court of Georgia for a writ of certiorari, to correct the alleged errors, all as provided by the rules of said Court.

This the 2nd day of March, 1935.

Southern Railway Company, Plaintiff in Error, by E. S. Griffith, Walter Matthews, Maddox, Matthews & Owens, Its Attorneys at Law.

[File endorsement omitted.]

[fol. 221] SUPREME COURT OF THE STATE OF GEORGIA

NOTICE OF APPLICATION FOR CERTIORARI—Filed March 28, 1935

To the Clerk of the Court of Appeals of Georgia:

You are hereby notified that there has been filed in this office on this day an application to the Supreme Court for a writ of certiorari to the Court of Appeals in the case of Southern Railway Co. v. O. C. Lunsford, Admx.

K. C. Bleckley, Clerk Supreme Court of Georgia.

[File endorsement omitted.]

[fol. 222] SUPREME COURT OF GEORGIA

ORDER DENYING WRIT OF CERTIORARI—May 29, 1935

Upon consideration of the application for certiorari filed to review the judgment of the Court of Appeals in this case, it is ordered that the writ be hereby denied.

All the Justices concur.

Clerk's certificate to foregoing paper omitted in printing.

[File endorsement omitted.]

[fol. 223] Clerk's certificate to foregoing paper omitted in printing.

[fol. 224] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1935

The petition herein for writ of certiorari to the Court of Appeals of the State of Georgia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.